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Faber fecit 1725.

CASES

Argued and Adjudged in the

High Court of Chancery.

Publiſhed from the MANUSCRIPTS of

THOMAS VERNON,

Late of the *Middle Temple*, Eſq;

By ORDER of the

HIGH COURT OF CHANCERY.

VOL. I.

In the *SAVOY*:

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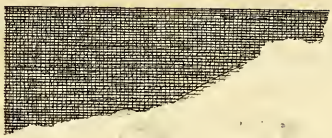

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To the Right Honourable

PETER

Lord KING,

Baron of OCKHAM,

Lord HIGH CHANCELLOR of *GREAT BRITAIN.*

HAVING in Obedience to an Order of that Court, where your *Lordſhip* now preſides, ſuperviſed and fitted for the Preſs one Volume of

a Mr.

Mr. *Vernon*'s Reports, we beg leave to lay it before your Lordſhip; And this we the rather preſume to do, that by prefixing your Lordſhip's Name to this *Work*, we may do Juſtice to the Memory of that *Great Man*, whoſe Abilities in his Profeſſion were ſo well known to your Lordſhip.

Theſe *Reports*, how uſeful ſoever they may be in themſelves, would have been much more valuable, if they had been brought down to your *Lordſhip*'s Time, and had taken in the Decrees, which are made by your *Lordſhip* with ſuch diſtinguiſhing Judgment, and ſo impartial a Regard to the Rules of Juſtice and right Reaſon.

His

His Majeſty in intruſting your *Lordſhip* with the Cuſtody of the *Great Seal*, has no leſs gratified the Deſires of his People, than given a convincing Proof, (if any can be wanting after what his *Majeſty* has already done) how much he conſults the publick Welfare: And when it is conſidered how agreeable his *Majeſty*'s Choice of a *Chancellor* has been to the whole Nation; your Lordſhip, we hope, will permit us to ſay, there muſt be ſomething very *uncommon* in a Perſon, in whom the differing Sentiments of all Parties ſo intirely unite.

May your Lordſhip long enjoy the *Honours*, which you have ſo deſervedly acquired, and may thoſe *Labours*,

which are ſuſtained by your Lordſhip with ſuch unwearied *Patience* for the publick Good, be attended with Succeſs ſuitable to the *Zeal*, with which they are undertaken.

We are

Your Lordſhip's

moſt Dutiful, and

moſt Obedient Servants,

Wm-Peere Williams.

Wm. Melmoth.

A

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DE

Termino S. Hillarii,

1680.

In Curia Cancellariæ.

Lord Chancellor Nottingham 11 *Febr.* 1680.

Tho. Tiffin, Brother and Heir of *Robert Tiffin*, } Plaintiff.

Mary Tiffin, Executrix of *Robert Tiffin*, *Crick* and *Groome*, } Defendants.

Case 1.

ROBERT *Tiffin* purchaſed the Lands in queſtion, and took the Fee in his own Name, and an Aſſignment of the Mortgage term for Years in the Names of the Defendants *Crick* and *Groome* in truſt, and made his Wife the Defendant *Mary* Executrix. The Plaintiff as Heir brought this Bill for an Aſſignment of the Term; for that it was to attend the Inheritance.

2 Ch. Rep. 49. 55.

A Man purchaſes Land and takes the Fee in his own Name, and an Aſſignment of a Term in a Truſtee's Name; the Term ſhall attend the Inheritance, tho' not ſaid in the Aſſignment it ſhould do ſo.

The Defendant the Executrix inſiſted, there was no mention in the Aſſignment, that the Term was to attend the Inheritance; and that it was a Term in *groſs*, and ought to be enjoyed as a Chattle; and was Aſſetts.

The Cuſtom of London ſhall not prevent the attendance of a Term on the Inheritance

V. poſt. Dowſe verſ. Percival. Caſe 92.

Lord Chancellor, A Term in the Owner is Aſſetts at Law, but a Term in Truſt is not to be made Aſſetts in Equity; and it would be dangerous to Purchaſers to make it ſo: and cited the Caſe of *Greene* and *Lambert,* where it was adjudged the Cuſtom of *London* ſhould not prevent the attendance of a Leaſe on the Inheritance: and Decreed the Truſtees to aſſign the Term to attend the Inheritance.

D E

DE

Termino Paſchæ,

Ann' Regn' Car' II. Regis 33, *Annoque Dom.* 1681.

In Curia Cancellariæ.

Winn verſus *Littleton.*

Caſe 2.

WINN being ſeized of divers Lands in Fee in the ſeveral Counties of *G. M. D.* within the Dominion of *Wales*; and having likewiſe divers other Lands in other Counties within the Dominion of *Wales* made over to him in Mortgage, he by his laſt Will deviſes all his Lands in the Counties of *G. M.* and *D.* to Sir *John Winn* and his Heirs, and deviſes a Rent-Charge of 80 *l. per Annum*, iſſuing out of the ſame Lands, and then bequeaths divers Legacies to the Value of 1500 *l.* And then comes this Clauſe in his Will, viz. *The Reſidue of all my Perſonal Eſtate I give to my loving* ——Executor, (leaving a Blank for the Name of his Executor) And upon this Will the Queſtion was, Whether the Lands he had in Mortgage ſhould paſs to Sir *John Winn* by the Deviſe of all his Lands; or whether the Lady *Littleton*, who was next of Kin, and was his Adminiſtratrix, ſhould have them?

2 Ch. Rep. 51. A Man ſeized in Fee of divers Lands, and having alſo Lands mortgaged to him, deviſes all his Lands to A. and his Heirs.

Upon hearing Counſel, it was decreed *per* Lord *Chancellor* for the Adminiſtratrix. And in this Caſe it was declared

clared by the Lord *Chancellor*, that always, when a Mortgagee dies, and makes no Deviſe of the Lands he has in Mortgage, they ſhall go to the Executor. And in *London* there is this ſpecial Cuſtom, That Lands in Mortgage are always reckon'd the Perſonal Eſtate of the Mortgagee, he being a Citizen. And as to the Principal Caſe, it was obſerved,

Firſt, That the Teſtator doth make ſpecial Mention of the three Counties in which his own Lands of Inheritance lay, but not of the Counties in which the mortgaged Lands lay, but adds a General Clauſe *currente calamo, or elſewhere within the Dominion of Wales*; and having thus deſcended to Particulars, he has thereby ſo limited and circumſcribed his Intention, that the General *Fortuitous* Clauſe cannot open or enlarge it, for that is but in the nature of an *Et cætera*, and may ſerve to fetch in ſmall Parcels of Land, that were the Teſtator's own Inheritance, that lie out of the ſaid three Counties, if any ſuch there are (as in Truth in this Caſe there were) but ſhall never reach the mortgaged Lands, which are of a different Nature; and the rather, for that in this Caſe the mortgaged Lands were of great Value, and equivalent, if not exceeding, the Value of his other Lands, and therefore muſt not paſs by ſuch a General Clauſe, as if they were only Skirts and Members of the other Lands.

Secondly, For that he by his Will hath charged the Lands, that paſs by this Deviſe (*of all his Lands*) with a Rent-Charge for Life, and no Man can be thought ſo improvident as to grant a Rent, for ſo great an Eſtate and of ſo long a Continuance as for Life, out of Lands which are every Day redeemable; altho' it was anſwered, that when the Mortgage ſhould be redeemed, every one ſhould have Part of the Money *pro Rata* for their ſeveral Intereſts.

Thirdly, Suppoſe the Deviſe had been of all his Lands in the ſaid three Counties, as in this Caſe it was, and then without more he had ſaid, that the reſt of his Perſonal

Eſtate ſhould go to his Executor, there perhaps the mortgaged Lands ſhould paſs, for otherwiſe there would be nothing to anſwer and make Senſe of that Clauſe, *And the Reſidue of my Perſonal Eſtate*, &c. for that doth imply, that he had already deviſed ſome Part of his Perſonal Eſtate, or at leaſt it ſhews, that he meant Part of it ſhould have paſſed: But as this Caſe is, thoſe Words, *Reſidue of his Perſonal Eſtate*, are without any ſuch Conſtruction, well underſtood and effectually anſwered; for before that Clauſe in his Will he had deviſed divers Legacies, that in the Whole did amount unto 1500 *l.* And foraſmuch as the Adminiſtratrix in this Caſe was neareſt of Blood to the Teſtator, and therefore as well intitled to the Equity of this Court, as the Deviſee, who was more remote in Blood, although he was of the ſame Name, and this being a Caſe purely of Conſtruction, for that theſe mortgaged Lands cannot paſs to the one or other of them by the Words of the Will; and ſo there is Conſtruction againſt Conſtruction, and not a Conſtruction againſt the Letter of the Will. Hereupon it was decreed that the Adminiſtratrix ſhould have the ſaid mortgaged Lands.

The Earl of *Kingſton* verſus the Lady *Elizabeth Pierepont.*

Caſe 3.

THE Caſe was thus: *Gearvaſe Pierepont* deviſes by his Will 10000 *l.* to procure by all lawful Means a *Dukedom* to the Head of his Family, ſo that it be within a Year after his Deceaſe: And a Bill was exhibited to have the Mony applied accordingly; but upon a Demurrer, it was adjudged againſt the Plaintiff, as well, for that it is illegal to acquire Honour for Money, as alſo for that the Bill was not exhibited within due Time, ſo as to attach the Mony in Equity within the Year.

10000 l. left by Will to procure a Dukedom to the Head of the Family.

Caſe 4.

Love verſus .....

A Freeman of London ſettles a Jointure before Marriage, in lieu of his Wife's Cuſtomary Share of his Perſonal Eſtate, and then by Will gives two Thirds of his Perſonal Eſtate to his Daughters, and one Third to his Sons

A Citizen of *London* being poſſeſſed of a Perſonal Eſtate to the Value of 18000 *l.* and having made a competent Jointure to his Wife on his Marriage, it was agreed, that he might diſpoſe of two Thirds of his Perſonal Eſtate by his Will, *viz.* One third Part, which would have belonged unto his Wife, had he not made a Settlement upon his Marriage in lieu thereof, by which Means her cuſtomary Part comes to be at his Diſpoſal; and one other third Part, which is the Legatory Part, which every Citizen may diſpoſe of by his Will; and having two Sons and two Daughers, he makes his Will, and by it deviſes two Thirds of his whole Eſtate to his Daughters, and one Third to his Sons: Hereupon the Chamber of *London* would have diſtributed his Eſtate in this Manner: Firſt, To make an equal Diviſion of the Cuſtomary Part, *viz.* of 6000 *l.* amongſt all the four Children, which was 1500 *l.* a-piece, and then allot two Thirds of the Reſidue to the Daughters, and one Third to the Sons; ſo that by this Diviſion each Daughter ſhould have only 5500 *l.* and each Brother ſhould have 3500 *l.* But the Lord *Chancellor* declared, that the Intent of the Teſtator did to him plainly appear to be, that his Daughters ſhould have two entire Thirds of his whole Eſtate, which is 6000 *l.* a-peice; and it was decreed accordingly.

In what Manner the Diviſion ſhall be made.

DE

Term. S. Trinitatis,

33 *Car' II. Regis.*

In CURIA CANCELLARIÆ.

Sir *Edward Turner*'s Caſe.

Caſe 5.

A Feme poſſeſſed of a truſt of a Term, marries. The Husband may diſpoſe of it.

Memorandum, That about *Michaelmas* laſt it was Adjudged in an Appeal in the Houſe of *Lords*, in the Caſe of Sir *Edward Turner*, That a Term being aſſigned in Truſt for a Feme by her former Husband, and ſhe afterwards intermarrying with the late Lord *Chief Baron Turner*, who aliened the Term, That the ſame was well paſſed away, and that the Husband might diſpoſe thereof; and my Lord *Chancellor*'s Decree was thereupon reverſed: But it was agreed, that where a Term is aſſigned in Truſt for a Feme by the Privity and Conſent of her Husband, there without doubt the Husband cannot intermeddle or diſpoſe of it.

Otherwiſe, if the Term is Aſſigned in truſt for the Wife with the privity of the Husband

V. poſt. Pitt. verſus *Hunt.* *Caſe* 10.

Newcomb verſus *Bonham.*

Caſe 6.

2 Ch. Rep. 58. & 159.

A Mortgage is made redeemable during the Life of the Mortgagor only; yet his Heirs ſhall redeem.

A Man being ſeized of Lands in Fee, makes an Abſolute Conveyance thereof to the Defendant *Bonham*; but by another Deed of the ſame Date the Lands are made redeemable upon Payment of 1000 *l.* and Intereſt at any time during the Life of the Grantor; and in caſe the Lands ſhould not be redeemed in his Life-time, then he Covenants that the ſame ſhould never be redeemed.

ed. The Grantor dies before the Lands are redeemed, and his Heir at Law exhibits a Bill to have a Redemption.

And in this Caſe the Mortgagor may be foreclоſed in his own Life-time.

It was in Proof in the Cauſe, that the Mortgagor had a Kindneſs for the Mortgagee, as being his near Relation, and did intend him the Lands after his Death, and that the Clauſe of Redemption was put in only upon the Account that the Mortgagor was then a Batchelor, and ſo might marry, and have Iſſue; but that his full Intent was, that in caſe he dyed without Iſſue the Mortgagee ſhould have the Lands abſolutely without Redemption; And alſo that the ſaid one thouſand Pounds was really the full Value of the Eſtate at the time of the Conveyance, but it afterwards happened to be a good Bargain, it being a Reverſion after two Lives, and the two Lives happening to die within a ſhort time: And it was urged that the Mortgagee run hazard enough, for that as it happened to be a good Bargain, it might have been a bad one, and yet he had no Covenant nor other Remedy to compel the Repayment of his Money, for the Mortgagor had time to redeem during Life; and ſuppoſe the Mortgagor ſhould have lived 30 or 40 Years after the Mortgage made, and then had come to redeem, as he might have done, there had been all the Intereſt upon Intereſt thereby loſt, which comes to more than the Principal.

But *Vid. poſt.* *Caſe* 227. where this Decree was reverſed.

The Lord *Chancellor* was of Opinion, that although the Mortgagor had time to redeem during Life, yet the Mortgagee might have compelled him to redeem, or have foreclоſed him: And ſaid that it was a General Rule, *Once a Mortgage, and always a Mortgage*; And in regard the Eſtate was expreſsly redeemable in the Mortgagor's Life-time, it muſt continue ſo afterwards, and therefore Decreed an Account and a Redemption.

Once a Mortgage, and always a Mortgage.

See the Caſe of *Howard* verſus *Harris*, *poſt.* *Caſe* 31. & 191.

DE

Term. S. Michaelis,

33 *Car' II.* 1681.

In Curia Cancellariæ.

Prodgers verſus *Phrazier.*

Caſe 7.

THE King by his Letters-Patents grants to Sir *Alexander Phrazier* the Cuſtody of one *Bridgett Dennis*, an Ideot, *&c.* by very full words. *Habend'* to Sir *Alexander Phrazier*, his Executors, Adminiſtrators and Aſſigns, during the Ideotcy of the ſaid *Bridgett Dennis*; and now upon the Death of Sir *Alexander Phrazier*, Mr. *Prodgers* a Bedchamber-man begs the Cuſtody of the ſaid Ideot, and obtains Letters-Patents for the ſame.

2 Ch. Rep. 70.

The Cuſtody of an Ideot cannot be granted to a Man, his Executors, Adminiſtrators and Aſſigns.

But *Vid. poſt. Caſe* 129. where it was referred to a Tryal at Law.

The Point in this Caſe argued by the Council was, *whether the Cuſtody of an Ideot can by Law be granted to a Man, his Executors, Adminiſtrators, and Aſſigns.* And, *Firſt*, A Difference was taken and agreed on all Hands between the Caſe of an *Ideot* and a *Lunatick*; that in the Caſe of a Lunatick, it is only a Truſt in the King, and no Profit by Law intended him thereby; But in the Caſe of an Ideot it is otherwiſe; for the King by his Prerogative has an Intereſt in the Eſtate of the Ideot, and a Right to the Profits thereof; and to that Purpoſe was cited the *Statute de Prerogat' Regis*: and it was urged by Mr. *Holt*, that where the King has a Prerogative, it is intended for the King's Advantage, and not for the Benefit of the Sub-

ject; and that the King has in this Case a Prerogative, he cited *Dame* Hales's *Case*, where a Man marries an Ideot, and has Issue by her, whereby he becomes Intitled unto her Estate during his Life in his own Right; yet if afterwards by Office she be found an Ideot, the King by his Prerogative shall have the Lands: And it was resembled to the Case of a *Ward*, where *Littleton*'s Text is, That the Wardship of a *Tenant in Capite* shall go to the Executors; but otherwise of a Wardship in *Soccage:* and the Reason is, that in the first Case there is a Profit by Law intended to the Guardian or Committee, and an Interest vested; but in the other Case, only a Trust: and although Estates at Common Law ought to have a certain Commencement, and a certain Determination; yet there are many Interests of this Nature allowed in Law, and are called *incerta Interesse*; as where Land is extended against the Heir upon the Recognisance of his Ancestor; the Conusee is to hold until such time as the Money shall be levyed; and the Grant of the Goods of a Person outlawed is, until the Outlawry shall be reversed; and there are divers other Cases of the like Nature: and Mr. *Serjeant Maynard* put this Case, where the King grants the Custody of a Ward *quam diu in manibus nostris extiterit*, that is, until such time as Livery shall be sued. And it was said by Mr. *Wallop*, that this is only a private Minute Trust, and none of the great Trusts; as are such, as concern the Administration of Justice, or the King's Revenue: And yet in a late Case in the *Exchequer*, between *Squib* and
it was adjudged, that the Office of a *Teller of the Exchequer* might be Granted to One, his Executors, Administrators and Assigns. And it was said by Sir *Francis Winnington* and Mr. *Pollexfen*, that altho' there had not been those Words in the present Grant, of *Executors, Administrators, and Assigns*, yet the King having granted his Interest *quam diu*, the said *Bridgett Dennis* should continue an Ideot, it should have gone to the Executors of the Grantee. And it was observed, that the *Statute of the* 32 *of H.* 8, concerning the *Court of Wards and Liverys*, ranks Ideots and Wards

Wards in the ſame degree: and likewiſe that in *Fitz. N. B.* 139, and 232, The Wardſhip of an Infant is called the Cuſtody of an Infant, and that the Words are ſynonimous, the one from the *French* and the other from the *Latin.*

And by the Plaintiff's Council it was inſiſted, That tho' 'tis true, where there is a Profit and Intereſt, the ſame may be transferred and granted over; yet this is an Intereſt ſo linked and coupled with the Truſt of the Care and Maintenance of the Ideot, which the Law repoſes in the *King*, as in the ſafeſt Hands, that it cannot be granted over, otherwiſe than ſo as to be determinable at the King's Pleaſure.

To which it was replyed, That there was no Danger of a Breach of Truſt, becauſe it is for the Party's Benefit to preſerve and maintain the Ideot: And whereas it was objected, That this Intereſt would not be Aſſetts in the Hands of an Executor; it was replyed by Mr. *Serjeant Maynard*, that *that* was *Petitio Principii*, if it be a Profit and an Intereſt, as without doubt it is, by conſequence it muſt be Aſſetts.

The Lord *Chancellor* ſaid, That he did not take the Caſe of a *Ward* and an *Ideot* to be at all Parallel Caſes; for the King had the one as a Truſt, though coupled with an Intereſt; and the other purely as an Intereſt, Service, and Duty owing to him, and comes to the King in Point of Tenure: and therefore the King may grant the Cuſtody of a Ward *cum acciderit*, but there can be no ſuch Grant of the Cuſtody of an Ideot; But he ſaid, if the Emolument and Advantage, that by Law is given to the King, in Caſe of an Ideot, could be ſeparated from the Truſt, then clearly it might be transferr'd; But this is a Caſe of great Conſequence and *Primæ Impreſſionis*, for no one can ſhew any ſuch Grant from the time of the making of the *Stat' de Prerogat' Regis* until this Day: and

it

it ſhould be well conſidered, what Inconveniency may ariſe in allowing of Grants of this Nature; For ſuppoſe the Grantee makes an Infant Executor, or dies Inteſtate, what ſhall then become of the Cuſtody of the Ideot? But he ſaid there was that in this Caſe, that would make an End of it; For he had formerly ſeen the Inquiſition, upon which both theſe Grants were founded; and it is thereby found that *Bridgett Dennis* had been an Ideot for Eight Years laſt paſt, which is utterly a void Inquiſition; For an Ideot muſt be found to be ſo *a Nativitate*, otherwiſe it is not an Ideot, but a Lunatick only; and both the Letters-Patents, as well that to Sir *Alexander Phrazier*, as this latter to the Plaintiff *Prodgers*, being founded upon this Inquiſition are both Void: And my Lady *Phrazier* had beſt have a Care leſt ſhe ſhould be called to an Account for the Profits already received; and adviſed the Parties to conſider of it, and when they came next to produce the Inquiſition; And, if it could be, that they would end the Matter by Compromiſe.

At another Day the Caſe of *Vaine* and *Bier* in the *Exchequer* was cited, where it was reſolved, that the Office of *Policys of Aſſurance* might be granted for Years, againſt the Opinion in Sir *George Reynolds*'s Caſe; and *Squib*'s Caſe in the *Exchequer* cited, where it was reſolved that the Grant of a *Teller of the Exchequer* to a Man and his Aſſigns was a good Grant. But the Lord *Chancellor* relyed much upon it, that there never was any Preſident of the Cuſtody of an Ideot granted to a Man, his Executors, Adminiſtrators and Aſſigns, as this Caſe was: And he ſaid *what never was, never ought to be*; And he ſaid *that* was a good Reaſon given by *Littleton* on the Stat' of *Marlebridge*.

Sir

Sir *Francis North*, Ch. Juſtice of C. B. } Plaintiff. Caſe 8.

William Way & al' Daughters and Coheirs of *John Addington*, } Defendants.

Lord Nottingham, 21 *Junii* 1681.

JOHN Addington, ſeized in Fee, conveys the Lands in queſtion to Truſtees, in Truſt that they ſhould convey to ſuch Perſons and for ſuch Eſtates as he ſhould by Will direct; and then makes his Will, and thereby directs that the Truſtees ſhould convey to *Thomas Addington* his Son in tail male, Remainder to *Richard Addington* Brother to *John* in tail male, Remainder to his own right Heirs; which the Defendants were, *Thomas* their Brother being dead without Iſſue.

2 Ch. Rep. 78. Common Recovery by *ceſtuy que Truſt* in Tail bars the Entail and all the Remainders.

Richard Addington being *Ceſtuy que Truſt* in tail ſuffered a common Recovery, and deviſed to his Siſters *Champernoon* and *Way* to ſell, to pay Debts and Legacies. They contract with the Plaintiff to ſell to him by Articles; and he brings his Bill to diſcover Incumbrances, and what Title the Daughters and Heirs of *John Addington* had.

They inſiſted on their Remainder in Fee by their Father's Will, and Settlement; and that *Richard*'s Recovery was void, there being no good Tenant to the Freehold; and *Richard* having only the Truſt of an Eſtate tail.

For the Plaintiff it was inſiſted, that if ſuch a Truſt could not be barr'd, it might let in Perpetuity.

Maynard ſaid, he thought any common Conveyance ſufficient to diſpoſe of ſuch an Eſtate: and in the Caſe of *Waſhborne* and *Downs* it was taken without queſtion, that a Recovery by *ceſty que truſt* barr'd the Intail: but there being a Jointure out, it was referr'd to the now *Lord*

Chancellor, and 2000*l.* was awarded her. And the Caſe of *Goodrick* and *Brown* was Compounded: and it was ſaid, there was a Difference between a Fine and Recovery; becauſe a Fine does not bar the Remainder.

For the Defendant it was inſiſted, that the Reaſon, why a Common Recovery bars, is the Recompence in Value, which cannot be here; nor can ſuch a Recovery be reverſed for Error, as at Law. And there is the ſame Reaſon for a Fine, a Feoffment, or Bargain and Sale to do it, as a Recovery in this Caſe: and if this Recovery had been ſuffered by *Richard* in *Thomas Addington*'s life, it would not have been good; and why ſhould it be good now?

Lord Chancellor, Natural Juſtice is the Rule in Chancery, and not the Niceties of Law in Caſes cognizable here: and there is no ſuch Thing as an Eſtate tail of a Truſt; but it is created by and ſubject to the Rules of this Court: And ſaid, he thought a Feoffment and Bargain and Sale would work as a Fine: But it was clear, a Recovery would do it in Equity; elſe by Contrivance People might prevent Alienation, by placing the legal Eſtate in Truſtees: And declared, it had been always taken here, that ſuch a Recovery was good; and that *Bridgman* was clear of that Opinion in *Waſhborn* and *Downs*'s Caſe: and *Lord Chancellor* Decreed accordingly in this Caſe, that the Recovery was good.

Robert

Robert Benſon, Son and Heir of *Robert* his Father, and his two Siſters all Infants, by *Prochein Amy*, } Plaintiffs.

Sir *Henry Bellaſis*, and his Wife, Mother of the Plaintiffs and Adminiſtratrix of their Father, } Defendants.

Caſe 9.

July 6. *vel* 11. 1681.

ROBERT *Benſon*, in Conſideration of Marriage with the Defendant, the *Lady Bellaſis*, before the Marriage ſetled a Jointure on her, in full Recompence of Dower and of all Demands ſhe might make to his Perſonal Eſtate by the Cuſtom of the Province of *York* or otherwiſe, under this Proviſo and Limitation, that if ſhe after his Death did claim or recover any Part of his Perſonal Eſtate by the Cuſtom or any other Means whatſoever, Then the Truſtees were to be ſeized of the Jointure Lands and the Uſe thereof for 60 Years, in truſt to receive the Profits to the Uſe of ſuch Perſons as ſhould be damnified by her having or claiming Dower, or her Thirds, or any part of his Perſonal Eſtate, till the Perſons ſo damnifyed ſhould be reimburſed ſuch Damnification.

Settlement made in bar of all the Wife's Demands out of the Perſonal Eſtate of her Husband by the Cuſtom of the Province of *York* or otherwiſe. The Husband dies Inteſtate. Wife barred of her Diſtributive as well as Cuſtomary Part.

Robert Benſon died inteſtate, and the Lady his Widow took Adminiſtration; and the Plaintiffs, the Children of the ſaid *Robert Benſon*, brought their Bill for an Account of the whole Perſonal Eſtate of their Father.

The Defendant the Adminiſtratrix by Anſwer ſaid, ſhe was not acquainted, before her Marriage, what Agreement her Father and Mr. *Benſon* made, and that tho' ſhe ſealed the Deed, yet ſhe did not read it, nor hear it read, before ſhe ſealed it: and that ſhe was adviſed the Intention was, that Mr. *Benſon* might have his Real and Perſonal Eſtate Free to diſpoſe of it, if he thought fit; and he not having diſpoſed of his Perſonal Eſtate, but dying Inteſtate,

ſhe had taken Adminiſtration both in the *Prerogative* and at *York*; and was therefore Intituled to her diſtributive Share of her Husband's Perſonal Eſtate: and inſiſted that her Jointure, which her Husband affirmed was 500*l. per Ann.* being but 400*l.* ſhe ought to have that made good out of his other Lands; but there was not any Covenant that the Jointure was 500*l. per Ann.*

For the Defendant it was inſiſted, that her Title as Adminiſtratix was not expreſſed in the Agreement, tho' her Cuſtomary Part was, and that was *caſus omiſſus* in the Agreement; and ſo ſhe ought to have that.

But the *Lord Chancellor* declared, that the Intent was plain to exclude her wholly of the Perſonal Eſtate; and ſhe could not be intituled to a Diſtributive Part of his perſonal Eſtate without his dying Inteſtate; and it is plain it was in his Proſpect to bar her of what ſhe could claim by the Cuſtom or any other means whatſoever: And declared, the taking Adminiſtration was in violation of the Agreement; and if ſhe takes as Adminiſtratrix, what ſhe ſo takes muſt be made good out of the Jointure to the Children: and Decreed an Account of the whole Perſonal Eſtate to be taken by a Maſter, and the ſame to be put out for the Plaintiffs Benefit: and the Plaintiffs not oppoſing it, It was Ordered that 100*l. per Ann.* ſhould be added to their Mother's Jointure.

The Defendants, 10 *July* (83) or (84) obtained a Rehearing of this Cauſe by the Lord *Keeper Guilford*; who upon the Rehearing of it, Declared, that the Allowance of 100*l. per Ann.* a-piece Maintenance made the Defendants for the Plaintiffs by the Lord *Nottingham* (for ſo much was allowed them by this Decree) was too much; but in regard for the time to come the Charge of their Maintenance would be greater, Ordered they ſhould be maintained at that rate till their Ages of fourteen; but did not think there ſhould be any Additions to the Jointure. But the Defen-

Defendant, the Lady *Bellaſis*, muſt take it according to the Settlement; and conceived her Right to the Perſonal Eſtate was not taken away or leſſened by the Settlement; and therefore decreed one Third of the Perſonal Eſtate to the Defendants, to be enjoyed by them free of all Claims.

October the 31ſt, (85) the Plaintiffs obtained a Rehearing of this Cauſe by the Lord *Chancellor Jefferies*, as to the Third of the Perſonal Eſtate decreed to the Defendants; and he diſcharged the Lord *Guilford*'s Decree, and confirmed the Lord *Nottingham*'s Decree, as to the Perſonal Eſtate; but Decreed 150 *l. per Ann.* to be allowed yearly for each Child's Maintenance.

And *February* 23, (86) the Lord *Chancellor Jefferies*, upon an Original Bill brought by the Defendants againſt the now Plaintiffs, Decreed the Plaintiffs, then Defendants in that Cauſe, to make the Lady's Jointure up 500 *l. per Ann.* and this on the Evidence of her Father and Uncle, that *Benſon*, when he propoſed the Treaty of Marriage, offered to ſettle 500 *l. per Ann.* Jointure; and that he did after the Marriage take Notice, the Jointure was not of that Value, and talked of making it up ſo much.

But note there was no Covenant or Agreement proved, whereby he bound himſelf to make a Jointure of that Value; and the Portion was but 3300 *l.* to be paid on Contingencies, and not ſo good as 2000 *l.* in Hand; But Mr. *Benſon* was truſted to draw the Settlement.

The Lord *Guilford*'s Decree ſeems to be inconſiſtent with it ſelf, for he conceived the Defendants Right to the Perſonal Eſtate was not taken away or leſſened, *&c.* and yet Decreed them but one Third of it; whereas if her Right was not leſſened, ſhe had a Right to a Cuſtomary Part, as well as a Diſtributive Part.

Caſe 10.

Pitt verſus *Hunt.*

2 Ch. Rep. 73.

A Term aſſigned in Truſt for the Feme before Marriage without the Knowledge of the Husband may be diſpoſed of by the Husband.

THE Queſtion was, Whether a Term aſſigned in Truſt for the Feme before Marriage without the Knowledge of her intended Husband could be diſpoſed of by the Husband.

It was inſiſted by the Council for the Woman, that it could not be diſpoſed of by the Husband, and cited many Reſolutions in this Court to that Purpoſe, as *Edmonds* and *Barrington*'s Caſe, Sir *John Daccomb*'s Caſe, and *Sandys*'s Caſe: But on the other Side it was Anſwered, that true it is, there have been ſuch Reſolutions; but that now the Law is changed by the Reſolution of the *Lords* in *Ch. Baron Turner*'s Caſe, which is exactly the ſame Caſe with this, and it was there by all the Lords in Parliament reſolved, that the Husband might diſpoſe of the Truſt of the Term.

Ante, Caſe 5.

The Lord *Chancellor* ſeemed to wonder at that Reſolution, and ſaid it could not amount to an Act of Parliament to change the Law; and altho' at firſt there poſſibly was no great Reaſon for thoſe Reſolutions, that the Husband could not diſpoſe of a Truſt for the Feme made without his Privity before Marriage; yet the Law being ſo ſetled, People made Proviſions for their Children according to what the Law was then taken to be; and now thoſe Proviſions are defeated by this new Reſolution; ſo that now it is almoſt impoſſible for a Man ſo to provide for his Child, but it ſhall be ſubject to the Diſpoſal of an extravagant Husband: And he commended the Saying of *Chief Baron Walter*, *viz.* It is no matter what the Law is, ſo it be known what it is. But at laſt he ſaid he muſt be concluded by the Lords Judgment, and ſo he Decreed it according to Chief Baron *Turner*'s Caſe, ſaying that there muſt not be one ſort of Equity above Stairs

Stairs in the Houſe of *Lords*, and another below Stairs in *Chancery*. And he thought that from henceforth it would not ſerve turn to have the Husband's Conſent or Privity to an Aſſignment of a Term in Truſt for the Feme before Marriage, unleſs he was likewiſe made a Party to the Aſſignment.

Arundel verſus *Roll.*

Caſe 11.

In an Account no Allowance for Diet, where the Plaintiff came as a Gueſt at the Defendant's Invitation.

IN a Bill to have an Account of Moneys received by the Defendant for the Plaintiff's Uſe, the Defendant inſiſted to have an Allowance for the Plaintiff's Diet at the Rate of 5 *l. per* Week, alledging that ſhe was a Perſon of Quality and Fortune, and being courted by divers Noble Perſons much was ſpent in Entertainments: But it appearing by Letters read in Court, that the Plaintiff came to the Defendant's Houſe at her Invitation, and as a Gueſt only, the Defendant being her Aunt; It was ſaid by the Lord *Chancellor* that it was no honourable Demand, and Decreed ſhe ſhould account without having any Allowance for Diet deducted.

Jervois verſus *Duke.*

Caſe 12.

SIR *E. Duke* by his Will deviſed a Legacy of 2000 *l.* to one of his Daughters; but if ſhe ſhould marry one *Bacon*, that then the Legacy ſhould be void. She having before her Father's Death marryed the ſaid *Bacon*, takes Advice upon the Will, and is adviſed that the Legacy was void by reaſon of her having marryed *Bacon*. Her Brother pays her 800 *l.* and ſhe Releaſes her Legacy.

The Bill was to have this Releaſe ſet aſide, and her Legacy made good to her, pretending ſhe was circumvented in this Releaſe, her Brother telling her ſhe had no Legacy given her by her Father's Will, but was ras'd out of

of it, and that he ſuppreſs'd the Will, and did not Prove it till after ſuch time as he had obtained this Releaſe.

A Releaſe ſhall be avoided, where there is *Suppreſſio veri* or *Suggeſtio falſi*.

To which it was ſaid by my Lord *Chancellor*, that it is the conſtant Rule, where there is either *Suppreſſio veri* or *Suggeſtio falſi* the Releaſe ſhall be avoided.

Then they went on to Prove that Sir *E. Duke* in his Life-time did actually revoke this Will, and declare his Daughter ſhould have no ſuch Legacy.

An Executor may be admitted to prove the Revocation of any Legacy, tho' he has Proved the Will.

To which it was Objected, that they could not be Admitted to that Proof, by reaſon that the Defendant himſelf had Proved the Will, which he could not do without taking an Oath, that it was his Father's laſt Will. *Sed non allocatur*; for that he only Swears, that he believes it to be his Father's laſt Will, and at that time he might not know of the Revocation.

A Legacy given to a Feme on condition not to marry without the conſent of *J. S.* is only *in Terrorem*, if not Deviſed over.

And it being fully proved, that the Father had revoked this Legacy, it was Decreed by the Lord *Chancellor* againſt the Plaintiff, ſaying, that where a Legacy is Deviſed to a Woman, upon Condition ſhe marry with the Conſent of *J. S*; here if the Legacy be not Limited over, it is only *in Terrorem*, and tho' ſhe marry without Conſent, it doth not avoid the Legacy. But here in this caſe the Father himſelf having actually revoked the Legacy uponhis Daughter's Diſobedience, the Father himſelf has in this Caſe been Chancellor, and that with Equity too: ſuch an Example of preſumptuous Diſobedience highly meriting ſuch a Puniſhment; ſhe being only prohibited to marry with one Man by Name, and nothing in the whole fair Garden of *Eden* would ſerve her turn but this *forbidden Fruit*.

Newland

Newland verſus *Horſeman.* Caſe 13.

SIR *Benjamin Newland* being Sued upon his Charter party for Freight, exhibits his Bill to ſtay Proceedings at Law; and the Cauſe coming this day to be heard, the Caſe appeared to be, That the Ship being unladen at *Barcelona*, where the Freight was made payable by the Charter party, the Factor refuſing to pay the Freight, the Maſter of the Ship Litigated there in the Admiralty for it; and the Cauſe was heard, and Judgment there given, That the Maſter ſhould have his Freight, but the Damages the Goods had ſuſtained in the Voyage by reaſon of the Deviation ſhould be Deducted, and the Account transferred to the *Deliquidators*, who are in the nature of our *Maſters in Chancery*, to take the Account, and the Mony ordered to be brought into Court; But the Factor had Appealed to a higher Court there.

A Sentence in a Court of Admiralty beyond Sea will conclude the Parties here.

Lord *Chancellor* declared, that he would not ſlight their Proceedings beyond Sea; and if in this Caſe the Damages had been there aſcertained, or a Peremptory Sentence given, the ſame ſhould have been concluding to all Parties: But it appearing the Factor was a Native of that Place, and therefore in all Probability might againſt Juſtice prevail, and *Horſeman* being willing to deſiſt his Suit there, his Lordſhip directed a Tryal here by Jury, to aſcertain the Damages ſuſtained by the Deviation.

Fawlkner verſus *Fawlkner.* Caſe 14.

THE Caſe was, that a Copyholder of Lands in Fee, where by the Cuſtom of the Manor the Lord had as a Profit *Aprendre* the Cut of the Woods and Underwoods growing on the Copyhold, obtains a Grant from the Lord of all the Woods and Underwoods growing, and

The Lord of a Manor, where by the Cuſtom he has the Cut of the Woods growing on the Lands, grants all the Woods and Underwoods

on the Copyhold Lands to the Copyholder in Fee. This ſhall not Merge in the Copyhold.

which afterwards ſhould grow on the ſaid Copyhold Lands, to him and his Heirs; the Queſtion was, Whether this ſhould not Merge in the Copyhold, being, as was alledged, only a Profit *a Prender*. *Firſt*, If a Copyholder pays a Rent to the Lord, and the Lord grants or releaſes this Rent to his Tenant, this ſhall Merge in the Copyhold. *Sed non allocatur*.

Deviſe of Lands to the Heirs at Law for 20 Years after the death of the Wife. This is an Eſtate for Life in the Wife by Implication; Otherwiſe, if the Deviſe is to a Stranger.

Secondly, In this Caſe the Copyholder deviſes to *J. S.* theſe Underwoods for 20 Years after the death of his Wife, to raiſe Portions for his younger Children. And the Queſtion is, whether the Feme had not by Implication an Eſtate for Life.

The Lord *Chancellor* ſaid, that where ſuch a Deviſe is made to the Heir, there indeed an Eſtate ſhall ariſe to the Wife by Implication; but where it is deviſed to a Stranger, as in this Caſe, there in the mean time it ſhall deſcend to the Heir.

Caſe 15.

How verſus *Tenants of Bromſgrove.*

Bills of Peace to prevent Multiplicity of Suits are proper in Equity.

THERE having been two Iſſues directed, the One, whether *How* the Lord of the Manor of *Bromſgrove* had a grant of *Free Warren*; and the other, in caſe he had a grant of *Free Warren*, whether there were ſufficient Common left for the Tenants: Upon Motion for a new Tryal, the Lord *Chancellor* ſaid, theſe Matters were properly tryable at Common Law; and he did not ſee, what Juriſdiction the Chancery had of this Cauſe: But it was urged, the Bill was brought to prevent Multiplicity of Suits, and was in its nature a Bill of Peace: and a new Tryal was granted, upon Payment of full Coſts.

Wilkinſon

Wilkinſon verſus ....

Caſe 16.

JOHN *Wilkinſon* one of the Six Clerks made his Will, and thereof made his Brother Executor, and Deviſed unto his Executor all his Eſtate both Real and Perſonal: And four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix. The Queſtion was, whether the Brother ſhould have the Perſonal Eſtate as Legatee. It was urged, that he ſhould; for he does not take it as Executor only, but by expreſs Words of Gift in the Will; and it appears, that there was not only a Benefit intended him as Executor, for even the Real Eſtate was Deviſed unto him: But it being in Proof, that he had not any the leaſt Real Eſtate in the World, it was ſaid by the Lord *Chancellor*, that the Perſonal Eſtate was intended him only as Executor; and it was thereupon decreed for the Widow the Executrix.

A Man makes his Brother Executor, and gives him all his Real and Perſonal Eſtate, and afterwards marrying, by a Codicil makes his Wife Executrix. She ſhall have the Perſonal Eſtate, and not the Brother.

Tracy verſus *Tracy*.

Caſe 17.

IN a Bill for Diſcovery of the Defendant's Eſtate, and to have the Writings brought into Court, and to prohibit Waſt in plowing *&c.* The Defendant by way of Plea ſet forth, that in Part of the Land ſhe had an Eſtate for Life, as a Jointreſs, without Impeachment of Waſt.

A. Tenant for life, Remainder to B. for Life, Remainder over. A. tho' diſpuniſhable of Waſt at Law, by reaſon of the meſn Remainder for Life, yet ſhall be injoined from committing Waſt in a Court of Equity.

It was Reſolved by the Lord *Chancellor*, that although ſhe was Tenant for Life, Remainder for Life, Remainder in Tail, ſo that ſhe was diſpuniſhable of Waſt at Common Law by reaſon of the meſn Remainder for Life, yet in ſuch Caſe this Court does always grant an Injunction to ſtay Waſt: But if her Jointure Deed were made with an Expreſs Clauſe of *without Impeachment of Waſt*, as in Truth the Caſe was, then there could be no Prohibition as to thoſe Lands.

But Tenant for Life without Impeachment of Waſt ſhall not be injoined from committing Waſt.

Caſe 18.

Heyward verſus *Lomax.*

A. indebted on Security carrying Intereſt, and on ſimple Contract, pays Money generally. It ſhall be taken to be paid towards diſcharge of the Debt, which carried Intereſt.

Vid. poſt. Perris verſus *Roberts. Caſe* 33.

WHERE a Man owes Mony on a Mortgage, and other Monys to the ſame Perſon on Account, for which he is not to pay any Intereſt, and he makes a General Payment, without mentioning it to be in diſcharge of the Mortgage, or of the Monys due upon the Account: It ſhall be taken to have been paid towards diſcharge of the Mony due on the Mortgage; becauſe it is natural to ſuppoſe, that a Man would rather elect to pay off the Mony, for which Intereſt was to be paid, than the Mony due on Account, for which no Intereſt is payable.

Caſe 19.

Dom' Rex verſus *Sneller, Ruſſel & al'.*

Superſedeas to a Writ *de Excom. capiend'* denied, tho' the *Significavit* was general and uncertain, and ſaid, that the Method was to proceed by *Habeas Corpus*. But an Appeal being brought, a *Superſedeas* was granted.

THE Defendants being Excommunicated for a Contumacy, and a Writ of *De Excommunicat' capiend'* awarded, It was moved for a *Superſedeas* to the Writ, by reaſon that the *Significavit* was general and uncertain. But it was ſaid by the Lord *Chancellor*, that a *Superſedeas* could not be granted upon that Ground; But if the Excommunication were not for any of the Offences within the Stat' of 5 *Eliz.* and the *Significavit* did not expreſs the ſame, the Remedy expreſsly appointed upon that Statute is a *Hab' Corpus*, and upon the Return of it, the Parties ſhall be diſcharged: But it being then alledged, that an Appeal was brought, and Security given to proſecute it with Effect, a *Superſedeas* was awarded, the Lord *Chancellor* ſaying, that the Appeal was a *Superſedeas* of it ſelf.

Coke

Coke and *Hodges.*

Case 20.

A Bill brought by an Adminiſtrator *durante minoritate*, and an Account decreed to be taken. The Infant marries, and thereupon the Adminiſtration during her Minority is committed to the Husband.

An Adminiſtrator *durante minoritate* obtains a Decree to Account; the Infant marries, and a new Adminiſtration during her Minority is granted to the Husband.

Upon a new Bill brought to have the Benefit of the former Proceedings, the Defendant demurr'd, and the Queſtion was, Whether this ſecond Adminiſtrator could carry on the Account?

Whether this ſecond Adminiſtrator can carry on the Account.

It was objected, that ſuch an Adminiſtrator cannot at Law take Execution on a Judgment obtained by the former Adminiſtrator: But it was ordered that the Defendant ſhould anſwer, and that Matter be ſaved unto him at the hearing of the Cauſe.

. . . . verſus *Emerton.*

Case 21.

THE Defendant had obtained Judgment in Ejectment againſt the now Plaintiff, and had Execution awarded, but the Underſheriff refuſed to execute it; whereupon by Rule of Court of the *King's Bench* the Underſheriff was ordered to attend, and for not attending an Attachment was awarded againſt him. After all this Proceeding, the Defendant in the Ejectment exhibits his Bill in this Court, and *Emerton* praying a *Dedimus* an Injunction was granted of Courſe.

A. after Judgment in Ejectment, and a Writ of Poſſeſſion taken out againſt him, brings a Bill, and has an Injunction on a *Dedimus*.

This Injunction was allowed to extend to the Underſheriff, who had refuſed to execute the Writ, and was in Contempt to an Attachment in the K. B. before the Bill filed.

I moved my Lord that this Injunction might not extend to ſtay Proceedings againſt the Underſheriff for his Contempt to the Court of *King's Bench*; for that he was proſecuted for the Contempt at the King's Suit; and it was unnatural for the King by his Injunction to ſtay his own Suit in another Court, the Offence being committed before the Bill exhibited: Yet the Motion was denyed by my Lord *Chancellor*.

DE
Termino S. Hillarii,

33 & 34 *Car' II.* 1681.

In Curia Cancellariæ.

Caſe 22. *Horrell*, Executor of *Tipper*, Plaintiff.

William Waldron, and three of his Children, Infants, } Defendants.

24 *Febr.* (81)

A perſonal Legacy given to an Infant more properly cognizable in Chancery than in the Eccleſiaſtical Court.

Tipper gave the three Children 200 *l.* to be paid within a Year after his Death; the Executor brought his Bill, and ſet forth, that neither of the Children was 10 Years old, and that the Teſtator died about a Year ſince, and that the Plaintiff was willing to pay the 200 *l.* ſo as he might do it ſafely, and be well diſcharged, and indemnified: And complained that the Father Sued him in the *Conſiſtory* Court, to force him to pay the 200 *l.* to the Father, without giving the Plaintiff any Security againſt the Children; their Father being a Butcher: And the Plaintiff inſiſted he could not be well diſcharged, but by a Decree in this Court; where Care would be taken to ſecure the Mony for the Children, and for the Plaintiff's Indemnity and Diſcharge.

The Defendant demurr'd, for that this Matter was properly determinable in the *Conſiſtory* Court, where the Matter

ter depended; it being for a Legacy, and that it was properly cognizable there.

But the *Lord Chancellor* declared, the Suit was proper here; and that if the Matter had proceeded to a Sentence in the Eccleſiaſtical Court, it was proper to come here for the Executor's Indemnity, and that here Legatees were to give Security to refund, but not there: And this Court would ſee the Mony put out for the Children, and ſo over-ruled the Demurrer.

Abery and *Jones*, Creditors of *Pointz*, } Plaintiffs.

Williams, Defendant.

Caſe 23.

Febr. 1681.

THE Bill ſet forth, that *Pointz* being indebted to the Plaintiffs 900 *l.* and to others 3000 *l.* became a Bankrupt, and 16 *Novembris* (80) a Commiſſion was ſued out againſt him, and he found a Bankrupt; and that ſeveral Suits of Tapeſtry of his were in the Defendant's Hands, which the Commiſſioners had aſſigned to the Plaintiffs for the Benefit of his Creditors, and that they ought to have an Account thereof; but that the Defendant pretended, they were pawned or ſold to him by *Pointz* the Bankrupt without any Truſt; whereas it was on a Truſt, and done to conceal them; and ſo pray'd a Diſcovery and Relief.

Equity will not compel a Man to diſcover what Goods he really bought of a Bankrupt after the Bankruptcy and before the Commiſſion ſued out, where the Party has no Notice of the Bankruptcy.

The Defendant pleaded, that neither he, nor any in Truſt for him, hath nor ever had any Goods belonging to *Pointz*, but what the Defendant bought *bona fide*, for a full Value in Mony really paid by the Defendant to *Pointz* or his Order, before any Commiſſion of Bankruptcy was ſued out againſt him, and before the Defendant had any Notice that *Pointz* was a Bankrupt, or had done any Act of Bankruptcy, and without any Truſt or Condition, other than that the Defendant by Parol did declare, that if *Pointz* repaid the Mony paid him by the Defendant, and

Intereſt

Intereſt for the ſame, at the Time agreed on, and then paſt, that then he would redeliver to *Pointz* the Goods; and averr'd, that *Pointz* failed to pay the Mony or any Part of it at the Time agreed on; and that *Pointz* two Years ſince agreed, that the ſame ſhould be ſold by *J. S.* and that by the Mony ſo to be raiſed, the Defendant ſhould be paid his Mony with Intereſt, and the Surplus to *Pointz*; and averred, that the Mony raiſed by Sale was 200 *l.* ſhort of what *Pointz* owed him, and which 200 *l.* was ſtill due; and that 19 *Octobris* (80) *Pointz* gave the Defendant a general Releaſe to that time; and that the Defendant had no Dealings with him ſince: And the Defendant further pleaded, that he had been examined by the Commiſſioners, as far as by Law he was obliged; and inſiſted, that being a Purchaſor ſo as aforeſaid, he ought not to be put to Anſwer, to ſubject himſelf to an Action, which the Bill aimed at, by preſſing a Diſcovery of what Goods of the Bankrupt's came to the Defendant's Hands.

The *Lord Chancellor* allowed the Plea; and ſaid, the Law was hard againſt Tradeſmen, that dealt with Bankrupts before Notice; and the Aſſignees ought not to be aſſiſted in Equity in any ſuch Caſe.

Note, There was the like Rule before given in the Caſe of one *Portman* the Banker, in the preſent *Lord Chancellor*'s Time.

Caſe 24.

Purefoy verſus *Purefoy.*

Where a Deed of Truſt is made for Payment of Debts, it ſhall extend only to Debts contracted at the time of making the Deed.

J. S. makes a Deed of Truſt for the Payment of his Debts, to take effect after his Death. The Words in the Deed were, *Moneys owing by him*; and a Schedule was annexed to the Deed, wherein mention was made of 1000 *l.* owing to *A*, and 500 *l.* owing to *B*, and then there is this *Item*, *viz.* the Sum of 3000 *l.* owing to other Perſons.

It

It was urged, that the Lands ſhould ſtand charged by this Deed, not only for ſuch Debts as were owing by him at the time of making thereof, but for any Debts he afterwards contracted, ſo as they did not exceed the Sum mentioned in the Schedule.

But it was Decreed, that thoſe Lands ſhould ſtand charged only with ſuch Debts as were owing at the time of making of the Deed. And the Lord *Chancellor* ſaid, it was ſo in all Caſes, where a Deed is made for Payment of Debts owing, unleſs it be expreſſed to be for Payment of ſuch other Debts, as he ſhould afterward Contract, or to that effect.

In this Caſe the Heir at Law by his Bill prayed an Account againſt a Truſtee for two ſeveral Eſtates that were conveyed unto him upon Truſt for Payment of ſeveral and diſtinct Debts; and now would have had his Bill diſmiſſed, as to one of the Eſtates, and have had the Account taken for the other only.

But it was decreed, that an Intire Account ſhould be taken of both Eſtates; For that it is allowed as a good Cauſe of Demurrer in this Court, that a Bill is brought for Part of a Matter only, which is proper for one Intire Account, becauſe the Plaintiff ſhall not ſplit Cauſes and make a Multiplicity of Suits.

And Mr. *Hutchins* ſaid, where a Bill is brought to redeem two Mortgages, and there is more Mony lent upon one of them than the Eſtate is worth, the Plaintiff ſhall not elect to redeem one, and leave the heavier Mortgage unredeemed, but ſhall be compelled to take both or none.

Caſe 25.

Fane and *Fane.*

A. by Will directs 1000 *l.* to be laid out in her Funeral, and raiſed out of her Plate and Jewels, and then gives the reſt of her Goods and Chattels to her Executors: And in another Clauſe, gives her Executors 100 *l.* a-piece for their Trouble, and after Debts and Legacies paid, gives all the reſt of her perſonal Eſtate to the Children of B. Decreed the whole Surplus to the Children.

THE Counteſs Dowager of *Bath* by her laſt Will, deviſ'd divers ſpecifick Legacies, and that 1000 *l.* ſhould be lay'd out in her Funeral, to be raiſed out of her Plate and Jewels, and then adds, *I give the reſt of my Goods and Chattels unto my Executors,* and afterwards in another Clauſe, *I give unto my Executors the Sum of* 100 *l. a-piece for their Care and Trouble, and after my Debts and Legacies paid, I give all the reſt of my perſonal Eſtate unto the Children of Sir* Fancis Fane, *the Money to be paid into the Hands of their Father*; and makes Sir *Francis Fane,* Sir *Henry Fane,* and Mr. *Cobb* her Executors, *&c.*

Mr. Serjeant *Maynard* would have had this Will ſo conſtrued, that both the Clauſes might ſtand together; *viz.* That the Executors ſhould have had all the reſt and reſidue of the Goods and Chattels, and that the Children as reſiduary Legatees ſhould have had only all the reſt of the Mony: Or, if the Words, *Goods and Chattels,* ſhould be conſtrued to comprehend all the perſonal Eſtate, ſo as the Clauſes could not be reconciled, Mr. *Sollicitor* preſſed, that the Children and the Executors ſhould be joint reſiduary Legatees; as where Land in the ſame Will is firſt deviſed to one, and afterwards to another, they ſhall take it between them, notwithſtanding my Lord *Cook's* Opinion, that the latter Clauſe revoked the firſt.

But it was Decreed by the Lord *Chancellor,* that the Children ſhould have the intire reſiduary Eſtate.

Firſt, Becauſe the Executors have 100 *l.* a-piece Deviſed to them.

Secondly, Altho' the Words of the Will are, (as was obſerved by Mr. Serjeant *Maynard*) that the Moneys ſhould be paid

paid into the Father's Hands, yet *that* ſhall not be taken to explain what perſonal Eſtate the Teſtatrix intended them, *viz.* only the reſt of the Mony and Debts, as Mr. Serjeant would have it. And it cannot be thought that my Lady *Bath* intended to make ſo nice a difference between her Goods and Chattels, and her perſonal Eſtate.

Thirdly, For that one may aver the Truſt of a perſonal Eſtate: and Mr. *Cobb*, one of the Executors, ſwears my Lady's Intent was, that the Children ſhould have the Reſidue of all her perſonal Eſtate.

It was therefore Decreed, that the Reſidue of the Mony ſhould be paid into their Father's Hands, according to the Will, and the reſt of the perſonal Eſtate delivered to the Children.

Brown verſus *Allen.*

Caſe 26.

IT was declared by the Lord *Chancellor*, that where a Man deviſes a ſpecifick Legacy, there tho' the other Legacies fall ſhort, yet the Legatee muſt have his ſpecifick Legacy intire: But where a Man deviſes ſeveral Legacies, as 100 *l.* to one, and fifty to another, *&c.* there although he directs the Legacy of 100 *l.* to be paid *in the firſt place*, yet if the other Legacies fall ſhort, there the Legatee of the 100 *l.* muſt make a proportionable Abatement of his Legacy.

In caſe of Deficiency of Aſſets a ſpecifick Legatee ſhall not abate in proportion with pecuniary Legatees.

But one pecuniary Legatee ſhall abate in proportion with the reſt, tho' his Legacy is directed to be paid in the firſt place.

Smithby verſus *Hinton.*

Caſe 27.

ALtho' an Executor does actually releaſe, yet he muſt be made a Party to the Suit.

Caſe 28.

Gee verſus *Spencer.*

Releaſe ſet aſide by reaſon of the Miſapprehenſion of the Party.

A Man poſſeſſed of a Leaſe for *three* Lives of the Rectory of *Orpington* in *Kent*, deviſed the Rectory by his laſt Will; but that being void, It came to his three Daughters as Coheirs and ſpecial Occupants. There being a Suit touching this Rectory in *Chancery*, the Husband of one of the Daughters fearing to be in Law, and being made to believe, that he ſhould be forced to pay Coſts, releaſed the Arrears that ſhould be coming to him for his Share of the Rectory to the other Siſters, who were to bear the Charge of the Suit; his Share of the Arrears amounted to 1000*l.*

This Releaſe was ſet aſide, and *Luxford*'s Caſe cited, *that a Miſapprehenſion in the Party ſhall avoid his Releaſe.*

Caſe 29.

Silway verſus *Compton.*

A Common, that has been Incloſed for 30 Years, ſhall not afterwards be thrown open.

Caſe 30.

Thickneſs verſus *Vernon.*

A Deviſe to two Perſons to be equally divided between them, makes a Tenancy in Common.

A Man makes *A* and *B* his Executors, and directs that 2000*l.* of his Perſonal Eſtate ſhall be laid out in Land for the Benefit of his Wife for Life, and then to his Executors to *be equally Divided betwixt them.* The Wife and One of the Executors dies before any diſpoſition made of this Mony.

Decreed by the *Lord Chancellor*, that this Mony ſhould not ſurvive: And he cited a Caſe in the late Times, where a Man deviſed his Perſonal Eſtate unto two Perſons

ſons equally, and there by the Advice of the Lord Chief Juſtice *Rolls* it was Decreed, it ſhould not ſurvive.

Howard verſus *Harris.*

Caſe 31.

2 Ch. Rep. 147.

Proviſo in a Mortgage that the Mortgagor or the Heirs Male of his Body might redeem.

Decreed the Aſſignee might redeem. *Poſt.* Caſe 191. and 212. *Vid.* ante Caſe 6.

HOWARD mortgages Land, and the Proviſo for Redemption was thus: Provided that I my ſelf or the Heirs Males of my Body may redeem. The Queſtion was, Whether his Aſſignee ſhould redeem it? and it was decreed, he ſhould; for, if once a Mortgage always a Mortgage.

In this Caſe Part of the Mortgaged Eſtate happened to be in Mrs. *Howard's* Jointure, and it was admitted that ſhe thereby was intituled to a Redemption of the whole Mortgage; and ſo it was adjudged in the Caſe of *Browne* and *Edwards.*

Sir *James Hayes* verſus *Kingdome.*

Caſe 32.

Joint-tenants. Survivorſhip.

LORD *Ranelagh*, *Daſhwood* and five others upon their Farming of the *Iriſh* Exciſe entred into Articles, that if any of them died their Parts ſhould ſurvive; and a Covenant, that none of them ſhould aſſign without Licence from the reſt. One with Licence, but not in all points agreeing with the Articles, aſſigns to his Son and a third Perſon in conſideration of five Shillings, and dies. The Queſtion was, whether his Aſſignees ſhould come in for his Share. But it was objected that this Aſſignment ſhould only Impower the Aſſignees to act and come in as Agents, but ſhould not intitle them to the Intereſt and Benefit of the Aſſignor's Share.

It was ſaid by the Lord *Chancellor*, If there had been no Covenant that it ſhould ſurvive, yet in Equity it ought, by reaſon of the joynt Charge and Expence. If there had been any Agreement amongſt the Farmors that it ſhould not ſurvive, that might have altered the Caſe;

but that is not ſo much as pretended, nor is there the leaſt Proof of it: And the Conſideration of the Aſſignment being but 5 *s.* it cannot be thought, it was ever intended that the Intereſt of the Aſſignor ſhould paſs by it, but only an Agency or Power of acting: and had the Aſſignment been made by Mr. *Lemuel Kingdome* to his Son only, there the Conſideration might have been for natural Love and Affection; but here the Aſſignment is made to his Son and another Perſon; So *that* Conſideration is out of the Caſe. And the Bill to have the Aſſignment made good was Diſmiſſed.

Caſe 33.

Perris verſus *Roberts.*

2 Ch. Rep. 83.

A. is indebted by Bond (in which J. S. is bound as Surety) and alſo by Simple Contract to B. A. ſtates an Account of both Debts with B. and makes a Bill of Sale, for ſecuring the Balance, which proves deficient.

On a Bill by the Surety Decreed the Mony ariſing by the Bill of Sale ſhould be applied towards diſcharge of both Debts in Proportion.

PERRIS became bound as Surety for *J. S.* unto *Roberts*. *J. S.* owes *Roberts* a further Debt upon Simple Contract. *J. S.* and *Roberts* come to a ſtated Account for all Moneys owing to *Roberts*, as well for what was due on the Bond, in which *Perris* was bound as Surety, as for what was due to *Roberts* upon Simple Contract: and there being due to *Roberts* on the Foot of the Account 85 *l.* *J. S.* makes him a Bill of Sale towards Satisfaction of the whole Debt.

It was inſiſted by Mr. *Sollicitor General* and others of Council for *Roberts*, that the Mony raiſed by this Bill of Sale ſhould in the firſt Place be applyed to ſatisfy the Debt due on Simple Contract, and then what remained to ſink the Debt, for which *Perris* ſtood bound as Surety; and the rather, for that in the Bill of Sale it is mentioned to be as a Security: and there is no Proof or Pretence of an Agreement or Direction, that this Mony ſhould be applyed to the Debt for which *Perris* ſtood bound; and to make any other Conſtruction, would be to conſtrue a Man out of his Debt.

To this Opinion at firſt the Lord *Chancellor* ſeemed to incline: But then it being inſiſted by Mr. *Hutchins* and others of

of Council with *Perris*, that it is natural to ſuppoſe, that where a Man owes a Debt upon Specialty, for which others are bound as his Sureties, he would in the firſt place take care to diſcharge that Debt, before another Debt that was due on Simple Contract only. But they did not inſiſt that the Moneys raiſed by the Bill of Sale ſhould in the firſt Place be intirely applied to ſatisfy the Debt for which *Perris* ſtood bound, but that both the Debts, that upon Specialty, and that upon Simple Contract, being blended and thrown together in one Account, and then a Bill of Sale made towards Satisfaction of the whole Debt, it was but Reaſon it ſhould be applied proportionably, as well for the ſinking of the Debt for which *Perris* ſtood bound, as towards Payment in Proportion of the Debt due on Simple Contract.

And it was ſo decreed by the Lord *Chancellor*, and ſolely upon this Reaſon, *viz.* that both the Debts had been caſt into one Stated Account, and the Bill of Sale made towards Satisfaction of the whole Debt.

But Mr. *Sollicitor* was ſtrong in his Opinion againſt the Decree.

Vid. ante *Heyward* verſus *Lomax*, Caſe 18.

Danvers verſus *Earl of Clarendon.*

Caſe 34.

THE late Earl of *D.* by his Will deviſed all his Goods in *Cornbury* houſe to the Lady *Gargrave* for life, and after her deceaſe to the Heir of Sir *John Danvers*: And the Point was, whether he that was Heir of Sir *John Danvers* ſhould take theſe Goods as Deviſee, and the ſaid Goods go to his Executors, altho' ſuch Heir dye in the life-time of the Lady *Gargrave*; Or whether he that was Heir of Sir *John Danvers* at the time of the Lady *Gargrave*'s Death ſhould have them.

Goods deviſed to A. for Life, and after the Death of A. to the Heir of B. B. dies in the Life of A. Decreed the Goods ſhould go to him that was Heir of B. at his Death, and not to him who was his Heir at the Death of A.

And it was urged by Mr. *W. Williams*, that theſe Goods were only the Furniture of the Capital Houſe, and were *quaſi* an *Heir-loom.* But

But the Lord *Chancellor* was of Opinion, that they abſolutely Veſted in the Perſon of him, that was Heir of Sir *John Danvers* at the time of his Death; and took notice that the Lord *Clarendon* in his Anſwer ſwore all the Judges of *England* had ſo given their Opinions: And this Opinion of the *Chancellor* was confirmed by another Clauſe in the Will, wherein *Henry Danvers*, who was then Heir of Sir *John Danvers*, was mentioned by Name: And it was thereon Decreed accordingly, that they Veſted in *Henry*, who was Heir of Sir *John Danvers* at his Death.

Caſe 35.

2 Ch. Rep. 84.

Pockley verſus *Pockley.*

Heres faſtus or a Deviſee ſhall have the Perſonal Eſtate applyed in caſe of the Real.

UPON a Rehearing, the Caſe was thus. Sir *Jeremy Smith* lends *Robinſon* 1600 *l.* with an intent to lend 1400 *l.* more, and takes a Mortgage for the Mony in *Pockley*'s name. Sir *Jeremy Smith* dies. His Executors refuſe to lend the other 1400 *l.* hereupon *Pockley* advances 1500 *l.* of his own Mony, and purchaſes an Annuity in Fee out of the Lands contained in the Mortgage, and takes an Aſſignment of the Mortgage to protect his Purchaſe, declaring the Uſes thereof to be for the Benefit of him and his Heirs; and then makes his Will, and appoints all his Debts to be paid, and particularly mentions the Debt of 1600 *l.* to Sir *Jeremy Smith*'s Eſtate, and deviſes his Real Eſtate unto his Nephew: And *Pockley* dying within the Province of *York* without Child, where by the Cuſtom, his Widow is Intituled to a Moiety of his Perſonal Eſtate,

The Queſtion was between the Widow and the Nephew, who was Deviſee of the real Eſtate, whether this Debt of 1600 *l.* to Sir *Jeremy Smith* ſhould be paid out of the Perſonal Eſtate.

It was inſiſted by the Council for the Widow, that in Caſe this 1600 *l.* Debt was not really a Debt of *Pockley*'s, his declaring it by Will to be his Debt, and appointing

it

it to be paid out of his Perſonal Eſtate, would not alter the Caſe; for that his Will could not work upon the Cuſtomary part; and to that Purpoſe they cited the Lady *Dethick*'s Caſe, wherein it was adjudged, that even a Voluntary Conveyance could not affect the Cuſtomary Part: and to prove that it was not in truth his Debt, they compared it to the Caſe where a Man purchaſes the Equity of Redemption; In that Caſe although he purchaſes the Land ſubject to the Debt due on the Mortgage, and muſt hold the Lands ſubject to that Debt; yet *that* Debt can never charge his Perſon; nor doth it in any ſort become his own proper Debt; and from hence it was urged, that this Annuity ſhould ſtand charged with the 1600 *l.* and that it was never the Perſonal Debt of *Pockley*: and though it has been lately reſolved, that *Hæres factus* ſhall be allowed the Benefit of having the real Eſtate diſcharged, yet ſuch an Heir ſhall never prevail againſt the Cuſtom.

A Man purchaſes an Equity of Redemption and dies. The Mortgage ſhall not be paid out of the Perſonal Eſtate for the Benefit of the Heir; it not being the Anceſtor's Debt.

But it was Decreed by the Lord *Chancellor*, that this Debt due to Sir *Jeremy Smith*'s Eſtate ſhould be paid out of the Perſonal Eſtate; and chiefly for that *Pockley* by his Will (which were the Words of a dying Man) had declared it to be his Debt, and appointed it to be paid out of his Perſonal Eſtate, and that *Pockley* had got the Mortgage ſo Transferred as to protect his Purchaſe; and it was ſaid by the Lord *Chancellor*, that not only he, who is *Hæres factus*, ſhall Pray in aid of the Perſonal Eſtate to diſcharge the Real, but even an Ordinary Deviſee ſhall have that Benefit.

Lee verſus *Sir Robert Henley & al'.*

Caſe 36.

THE Caſe was thus. *J. S.* being Seized of divers Lands in *Dorſet*, *Somerſet* and *Devonſhire*, (thoſe in *Dorſetſhire* being of equal Value with thoſe in the other two Counties of *Somerſet* and *Devonſhire*) and having two Nephews, one the Son of his Siſter *Henley*, and the other the Son of his Siſter *Lee*, whom he intended to make his Heirs; He, to prevent Diſputes between them

Omiſſion in a Voluntary Conveyance not ſupplied in Equity.

about the Partition of his Eſtate after his Death, by Conveyance executed in his Life-time ſetled all the Lands to the Uſe of himſelf for Life, Remainder to his Iſſue, if he ſhould happen to have any, in Tail; and then appointed the Lands in *Dorſetſhire* to his Nephew *Henley*, and the Lands in the other Counties to his Nephew *Lee*. In the Enumeration of the Particulars of the Lands in *Somerſet* and *Devonſhire*, a Farm or Manor of about 60 *l. per Ann.* was omitted; But after the Limitation of the Lands to his Nephew *Henley* there were added theſe General Words, *viz. And all other my Manors, Lands and Tenements, whereof no Uſe is already Limited, the ſame ſhall be unto the Uſe of my Nephew* Henley, *&c.*

It was inſiſted by *Henley*'s Council, that this Manor or Farm, omitted as aforeſaid, ſhould paſs to *Henley* by vertue of theſe General Words: But it was thereunto anſwered by *Lee*'s Council, that the omitted Farm could not paſs within thoſe General Words; for that although, when he comes to diſtribute the Lands between his Nephews, *that* Farm is omitted to be Enumerated, yet in the Limitation to himſelf for Life, Remainder in Tayl, there mention is made of that Farm, and ſo it is not within the words, *whereof no Uſe has been already limited*, for an Uſe of it was limited unto himſelf for Life: And it was Inſiſted by *Lee*'s Council, that he ought to have this entire Farm; for that the Scrivener who drew this Settlement ſwore this Farm was intended to be ſetled on *Lee*, as well as the reſt of the Lands in *Somerſet* and *Devon*, and that ſo were his Inſtructions, and that the ſame was purely the Omiſſion of the Clerk; and therefore they Inſiſted, that altho' this was a Voluntary Conveyance, yet being Proviſion for an Heir, the Intent of the Party might be ſupplyed in Equity, and made good by an Averment conſiſtent with the Deed; and for that Purpoſe they cited the Caſe of *Barrow* and *Barrow*. But the Lord *Chancellor* upon the whole matter did not think fit to Decree it for one or other of them, but left the Land in Queſtion to deſcend equally between the two Nephews.

DE
Termino Paſchæ,

34 *Car' II.* 1682.

In CURIA CANCELLARIÆ.

Micoe verſus *Powell & Ux' & al'.*

Caſe 37.

An Infant intitled to the Truſt of Lands in Fee marries without the Conſent of her Father.

The Father brings a Bill againſt the Huſband and Wife and her Truſtees, that a Proviſion might be made for her and her Children out of theſe Lands.

The Husband and Wife demur, and the Demurrer was allowed.

MICOE exhibits a Bill againſt *Powell* and his Wife and the Truſtees of the Wife's Eſtate, ſetting forth, that one Sir *Samuel Micoe* deviſed unto the Plaintiff's Son ſeveral Manors and Lands of the Annual Value of 400 *l.* and that the Son died without Iſſue, whereby thoſe Lands deſcended to the Plaintiff's Daughter; and ſetting forth, that the Defendant *Powell* had Clandeſtinely married his Daughter without his Conſent, and had made no Proviſion for, or Settlement on her and her Children; And that he was informed the Defendant *Powell* intended to make his Wife, who is now an Infant, as ſoon as ſhe ſhould come of Age, to ſell her Lands and levy a Fine of them: and for as much as the Eſtate in Law of the ſaid Lands was in *A.* and *B.* Truſtees, who could not be Compelled to tranſfer their Eſtate but in this Court, but threatned to do it voluntarily, unleſs prohibited by Order of this Court; Therefore out of a Fatherly Care of his ſaid Daughter, and to the intent that a Proviſion and Settlement be made for her, and that he might be relieved in

in all and ſingular the Premiſſes, Prays Proceſs againſt *Powell* and his Wife and the two Truſtees, *&c.*

To this Bill the Defendant *Demurred*, becauſe it appeared of the Plaintiff's own ſhewing, that he had no Right either in Law or Equity to the Lands in Queſtion, and that he does not pretend to be Truſtee or Superviſor thereof, or any ways impowered to Inſpect the Management of the ſame: and therefore he thinks himſelf not bound to ſatisfy his Inquiſitiveneſs: neither ought he to be called in Queſtion or Impleaded in this Honourable Court touching the ſame: and for that the Plaintiff's Bill doth contain no Equity, he doth Demurr in Law.

This Demurrer was allowed by the Lord *Chancellor*. But he ſaid, if Mr. *Powell* had been Plaintiff here in *Chancery* to have the Truſtees Transfer their Eſtate, or for any other Favour of the Court, then indeed, when he had ſuch a hand upon Mr. *Powell*, he could make him do ſuch things as ſhould be reaſonable; But upon this Bill there is no Colour in it.

Caſe 38.

Thompſon verſus *Attfeild.*

A Conveyance by way of Feoffment may Operate as a Covenant to ſtand ſeized.

IN this Caſe it was allowed, altho' a Conveyance be made purporting a Feoffment; yet nevertheleſs it may Operate as a Covenant to ſtand ſeiz'd: And a difference was taken between the ſeveral ſorts of Voluntary Conveyances; for tho' generally a Defect in a Voluntary Conveyance ſhall not be ſupplied and made good here, yet if a Man voluntarily makes a Settlement as a Proviſion for his Children, and for their Maintenance, ſuch a Voluntary Conveyance ſhall be ſupplied and made good here.

Defect in a Voluntary Conveyance not ſupplied in Equity. Otherwiſe, if made for a Proviſion for Children.

Turner

Turner and *Gwinn.*

Caſe 39.

IN this Caſe it was ſaid, that a Tenant in Tayl of an Equity of Redemption may deviſe it for the Payment of Debts.

Reaſon verſus *Sacheverell.*

Caſe 40.

2 Ch. Rep. 98.

Baron and *Feme* by Deed and Fine Mortgage the Wife's Land for 400 *l.* the Husband pays in part of the Principal, and afterwards borrows the ſame Sum again of the Mortgagee. Decreed the Heir of the Wife ſhould not Redeem without paying off both Sums.

BARON and *Feme* levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 *l.* They borrow this Mony, and make a Mortgage for it; and after the Mortgage is Forfeited, the Husband pays in part of the Mortgage Mony; but afterwards borrows as much Mony more of the Mortgagee, as he had paid in before.

It was Decreed, that the Mortgagee having the Eſtate in Law in him by the Forfeiture of the Mortgage, he ſhould hold the Land againſt the Heir of the Wife, until the whole Mony was paid; and if the Heir would not pay in the whole Principal, Intereſt and Coſts, he ſhould be foreclоſed.

Penn verſus *Chetle.*

Caſe 41.

Executio iſtius Brevis &c. Omitted in the Return of a Commiſſion to take an Anſwer, ſupplied by other Words in the Return.

THE Commiſſioners for the taking of an Anſwer in the Country had omitted to Indorſe the Writ, *Executio iſtius Brevis*, &c. For this Irregularity in the returning of the Anſwer, they had got the Anſwer referred to the Six Clerks; But upon Motion to the Lord *Chancellor*, for as much as the Commiſſioners had Indorſed on the Anſwer *Capt' & Jurat' &c. ſecundum effectum & tenorem Commiſſion' huic annex'*, and had annexed the Commiſſion to the Anſwer, it was Ordered the Anſwer ſhould be allowed.

Caſe 42.

Mallet and *Trigg.*

A Parſon Impropriate ſhall not have the Nomination of the Vicar.

IT was denied by the Lord *Chancellor*, that the Parſon *de jure* has the Nomination of the Curate, and more eſpecially where the Parſon is of a Lay Fee, as was the Caſe in Queſtion, *viz.* a *Prebendary* had demiſed for *three* Lives the Corps of his Prebend, which conſiſted of two Impropriations, and ſo now by the Statute were become Lay Fee: In the Leaſe were as general Words as was poſſible, and particularly that the ſaid Leſſee ſhould find two Vicars for the aforeſaid Impropriations, and pay to one ſo much, and to another ſo much. But the Lord *Chancellor* ſaid, that by finding, was meant maintaining only, and not electing or chooſing; and he ſaid, there was a great Difference as to the Parſon's Right of naming or chooſing his Vicar, where the Parſon was of a Lay Fee, and where he had a Cure of Souls: for in the latter Caſe there was reaſon he ſhould approve of the Man, who was to act under him in ſo high a Truſt. And the Curate that came in by Oppoſition to the Leſſee, was eſtabliſhed by the Lord *Chancellor*, and the Charity Decreed to him.

Note, This Caſe came before the Lord *Chancellor*, upon Exceptions to a Decree of the Commiſſioners of Charitable Uſes. One Exception was, that by the Stat. of 29 of this King, none but Eccleſiaſtical Perſons could augment poor Vicaridges, ſo as to be eſtabliſhed as a Charitable Uſe within that Statute, and that the Leſſor in this caſe, who was only a Prebendary, was not within that Statute. *Sed non allocatur.*

Caſe 43.

Man verſus *Ballet.*

No Agreement of the Pariſhioners, where ſeveral Charities are given for

UPon Exceptions to a Decree by the Commiſſioners for Charitable Uſes, the chief Matter inſiſted upon was this. Here were ſeveral diſtinct Charities given to a Pariſh, *viz.* ſuch a Farm worth 12 *l. per Ann.* for repairing

ing the Church, another Farm worth 6 *l. per Ann.* for mending the Highways, and ſo much to the Poor, *&c.* in all 40 *l. per Ann.*

ſeveral Purpoſes, can alter them, or divert them to other Uſes.

The Complaint againſt the Truſtees of this Charity was, that the Church had been out of Repair, and the Rents of the ſaid Farm of 12 *l.* a Year were not applied for the Repairs of the ſaid Church, but a Levy Rate had been raiſed on the Pariſhioners for ſuch Repairs.

The Truſtees reply, that what they wanted in Weight, they had in Meaſure. What was deficient as to the repairing of the Church, was ballanced and made amends for in the Greatneſs and Exceſs of the other Charities, *viz.* towards the Poor, and for the Highways, *&c.* and that all theſe Charities were intirely for the Benefit of the Pariſh, and no one Perſon concerned in them more than another; and that therefore if they had not exactly purſued the preciſe Original Direction of the Charity in its firſt Inſtitution, yet they having done nothing for any Man's private Advantage, but things only that were neceſſary, and Parochial Concerns, and in ~~them~~ *regard* they had really and *bona fide* expended all the Moneys they had received by vertue of this Charity, they hoped *that* ſhould excuſe them for the time paſt; and the rather for that they had but trod in the Steps of their Fore-fathers; for that for above 20 Years together this Mony had been promiſcuouſly diſpoſed of.

But the Truth of the Caſe fell out to be, that they had applyed this Mony for the finding of a *Lecturer*, and had allowed him 10 *s.* a Day, there not being then any One to officiate within the Pariſh: And it was urged, that this was in eaſe of the whole Pariſh, who otherwiſe muſt have found a Miniſter, and ſo it was the ſame thing to them whether they paid their Mony for the Church or Miniſter.

But

But the Lord *Chancellor* ſaid, If it ſhould be admitted that for Parochial Charities the Pariſhioners might by Agreement change and apply the Charities, as they thought fit, it would be a great Step towards deſtroying all Charities; and at this rate we ſhould have all Perſons Charities given away to Preaching Miniſters and Lecturers; but they ſhould not thus think *to rob Peter to pay Paul*: However for as much as this Mony for a long time had been thus promiſcuouſly applied for the time paſt, they ſhould not be puniſhed for that Miſempolyment in any thing, ſaving as to what was paid to the Parſon, for which they ſhould not be allowed one Farthing: and directed the Account to be ſo taken.

Another Exception was, That the Commiſſioners of Charitable Uſes by their Decree had charged them with the Rent of the Premiſes for two Years longer time, than in truth they had received it.

As to that the Lord *Chancellor* declared, That a Truſtee for a charitable Uſe was not otherwiſe or further chargeable than any other Truſtee is, who is only to be charged for ſo much as he receives, and ſhall not ſtand charged for the Receipts of others.

Note, Mr. *Attorney* in this Caſe harped much upon it, that this *Lecturer* was a *Presbyterian*, and as ſoon as he had done in the Church would run into a *Conventicle*; and upon his repeating this Matter ſo very often, the Lord *Chancellor* told him, he was not to be led or harangued with Prejudice into a Cauſe. It was not before him in this Cauſe, whether the Man was a *Presbyterian* or not: he minded the Matter only, and not the Man.

Anonimus.

Case 44.

A Mortgagee ſhall not Account according to the Value of the Land, *viz.* He ſhall not be bound by any Proof that the Land was worth ſo much, unleſs you can likewiſe prove that he did actually make ſo much of it, or might have done ſo, had it not been for his wilful Default: as if he turned out a ſufficient Tenant, that held it at ſo much Rent, or refuſed to accept a ſufficient Tenant that would have given ſo much for it.

Mortgagee ſhall not Account for more than he actually receives, unleſs where he has been guilty of a wilful Default; as if he has turned out or refuſed a ſufficient Tenant.

Newman verſus *Johnſon.*

Case 45.

A Man ſeized of Copyhold Lands ſurrenders them to the Uſe of his Will, and then by his Will ſays, *viz. My Debts and Legacies being firſt deducted, I deviſe all my Eſtate both Real and Perſonal to J. S.* And held by the Lord *Chancellor*, that this ſhould amount unto a Deviſe to ſell for the Payment of his Debts.

My Debts and Legacies being firſt deducted, I deviſe all my Eſtate Real and Perſonal to *J. S.* This amounts to a Deviſe to ſell for Payment of Debts.

In this Caſe it was ſaid by Mr. *Sollicitor General*, that a Parol Declaration is ſufficient to ſubject Lands to the Payment of Debts, where a Man has but an Equity only.

Jones verſus *Pureſoy.*

Case 46.

JONES having a Demand on *Pureſoy*'s Eſtate, as a Creditor for Mony borrowed by *Pureſoy*'s Father, and ſecured by Mortgage on this Eſtate, *Pureſoy* ſets up a Marriage Settlement, ſome time precedent to the Mortgage, to defeat it.

By a Proviſo in a Marriage Settlement the Deed was to be Void, if the Marriage was not had in 10 Months.

The Caſe was thus, in 1672 *Pureſoy*'s Grandfather being ſeized of the Eſtate in Queſtion makes this Settlement on

The Heir ſets up this Settlement to defeat a Mortgage made by his Father, after

his Father had ſworn, that he was not Married within the ten Months.

on his Grandſon; But in the Deed there is this Proviſo, *viz.* that in caſe the Marriage did not take effect within *Ten* Months then next enſuing, then all the Limitations and Uſes in that Deed ſhould ceaſe and be void. Afterwards in 1674 *Purefoy* the Father borrows Mony on this Eſtate, and in his Anſwer ſwears, that this Eſtate is not any wiſe Incumbered, for that the Marriage did not take effect within the *Ten* Months: And now the Grandſon ſets up this Deed of Settlement; and in the Replication the Plaintiff diſcloſed this Special matter, *viz.* that *Purefoy* the Father was not Married within the *Ten* Months according to the Proviſo in the Deed.

The Lord *Chancellor* on the hearing having Decreed it againſt the Defendant *Purefoy*, as well for that his Father's Oath was ſo ſtrong againſt him, as alſo for that *Purefoy* could not make it appear that his Father was married within the *Ten* Months by the Deed appointed:

The Defendant upon a Petition obtained a Rehearing, ſuggeſting that the Special Matter diſcloſed in the Replication came not in within time, ſo as to be Examined to, and put in Iſſue, and now the Defendant had diſcovered full and ſtrong Proof; but he could obtain no Relief on the Rehearing.

Firſt, It was Objected by the Plaintiff, that this Settlement was but a Voluntary Settlement, and therefore could never prevail againſt a Purchaſor, and that without Notice: But as to that Objection, they gave this clear Anſwer. It was true, it was a Voluntary Settlement; and if it had been made by the Perſon that Mortgaged theſe Lands, it ſhou'd never Prevail againſt a Purchaſor: But here the Settlement was made by the Grandfather, and the Eſtate paſſed from him; But the Mortgage was made by the Father, who was never ſeized nor poſſeſſed of the Eſtate.

Voluntary Settlement made by the Father is fraudulent as to any Mortgage made by himſelf. Otherwiſe as to a Mortgage made by the Son.

It

It was then inſiſted on the behalf of the Defendant, that the Replication in which this Special Matter was diſcloſed, came not in time, and ſo was not properly in Iſſue; and therefore the Defendant having now ſufficient Proof to maintain that his Father was married within the *ten* Months, *that* Proof ought to be received: And they produced the *Parſon* that married them, who was ready to ſwear, that he married them within the *ten* Months, and that the Regiſter Book of the Church, by which this Matter ſhould have been properly proved, was loſt. And they produced a Printed Book ſuppoſed to be printed juſt upon the Marriage of the Defendant's Father, in which amongſt other things was contained an *Epithalamium* (which Mr. *Phillips* called an *Elegy*) Two ſtrong Lines whereof were, *viz.*

And every Day of the Year ſhall be to you
The fifth of Jan. *One thouſand ſix hundred and ſeventy two.*

Which they would make uſe of as an Argument, that the Defendant's Father was married in 1672. But on the other ſide, they maintained that their Replication came in within time; and therefore no new Proof could be admitted.

The Lord *Chancellor* took Notice of what dangerous Conſequence it would be; that if after Publication paſſed, and People ſeeing where a Cauſe pincht, they ſhould then be at liberty to look out Witneſſes to boulſter up the faulty part of the Cauſe, the neceſſary Conſequence would be Perjury: And he declared where a Man had a juſt Debt due and owing to him (as this was of all hands admitted to be) if ſuch a Man could in any caſe, even by the ſtricteſt and moſt preciſe Rules of the Court, get any Advantage of an Heir, *&c.* he would never be inſtrumental in depriving him of that Advantage: and therefore he confirmed his former Decree, and eſtabliſh'd the Mortgage.

Where a Creditor can, even by the ſtricteſt Rules of the Court, get any Advantage, he ſhall not be deprived of it.

And *Purefoy*'s Council having preſt the Caſe of what pernicious Conſequence it would be to their Client, there

there being divers other Creditors, and that the Debts would nigh ſwallow up the whole Eſtate; the Lord *Chancellor* ſaid, the other Creditors would not have altogether ſo great an Advantage, as Mr. *Jones* now had, by reaſon of the Forms of the Court; yet even as to them, when they ſhould come into *Chancery*, the Defendant *Purefoy* would have a very difficult Defence, when he went about to perjure his own Father in a Court of Equity by the Evidence of the *Parſon* and the *Epithalamium*.

Caſe 47.

Goilmere verſus *Battiſon*.

An Agreement by Feme, when ſole, that if ſhe died without Iſſue, ſhe would leave I. S. 500 *l.* or the Land. Decreed the Agreement to be performed againſt the Huſband, who was Deviſee of the Wife.

THE Heir at Law pretending a Right to the Land in Queſtion, came to the Tenant in Poſſeſſion, who likewiſe claimed an Intereſt in the Fee; and threatning to evict her at Law, ſhe makes this Promiſe, *viz*, *If I dye without Iſſue of my Body, I'll either give you* 500 *l. or leave you my Land*: and now ſhe being dead, and having deviſed her Land to her ſecond Husband, who had never any Notice of this former Agreement, a Bill was brought to have an Execution of this Agreement.

It was inſiſted, that this was all the Portion her Huſband had with her, and therefore he was *quaſi* a Purchaſor; and that a Remainder after an Eſtate Tail is ſo remote, that ſuch an Agreement ſhould never be executed, in Equity: For if the Wife had really by Deed executed ſetled the Eſtate to the Uſe of her Self in Tail, Remainder in Fee to the Plaintiff, yet ſhe might at any time have dockt that Remainder by a Common Recovery.

But the Council on the other ſide inſiſted that an Agreement for ſuch a Remainder ſhould be executed in Equity, and that the Plaintiff could in no ſort be called a Purchaſor: and cited the Caſe of Serjeant *Maynard* verſus *Moſely*, where ſuch an Agreement after an Eſtate Tail was decreed.

1 Ch. Rep. 253.

The

The Lord *Chancellor* decreed the Agreement to be Executed.

Darcy verſus *Hall.*

Caſe 48.

Where a Mortgagee buys in an Incumbrance, he ſhall be allowed all that is due on it, tho' he bought it in for leſs. Otherwiſe, if an Heir or Truſtee buys in an Incumbrance.

WHERE an Heir or Truſtee buys in an Incumbrance, he ſhall be allowed no more, than what he really pays for it; unleſs he bought it to protect an Incumbrance to which he himſelf is intitled: But where a Stranger that has an Incumbrance upon an Eſtate buys in another Security to protect his own, he ſhall not only hold it, till he is ſatisfyed his own Debt and has Reimburſed himſelf the Mony paid for the Incumbrance he bought in, but even till he has received all the Mony and Arrears of Intereſt due on the Security he ſo bought in. And in this Caſe, tho' it was an Heir that bought in an Incumbrance (there being ſome Special Circumſtances in the Caſe) he was allowed on Account the whole Mony due on the Incumbrance he bought in, tho' he paid leſs for it.

The Earl of Huntington verſus *Greenville.*

Caſe 49.

Aſſignee of a Statute purchaſes the Eſtate, having notice of a Second Statute. How far he ſhall make Uſe of the firſt Statute to protect his Purchaſe.

THE Caſe was thus. One Mr. *Lewis* being Seized of the Lands in Queſtion on which there were two ſeveral Statutes, amongſt other Incumbrances: the Prior of the ſaid Statutes, which was a Statute for 1000 *l.* was bought in by the Earl of *Huntington* for 300 *l.* it having been formerly extended, and then but 300 *l.* remaining due upon it. The next Statute was for a great Sum of Mony, and belonged to the Defendant; and it was alledged, that the Plaintiff had notice of the Defendant's Statute, and was once in Treaty about buying it in. Two Years after the Plaintiff had bought in the firſt Statute, he Purchaſes the Lands in Queſtion: And afterwards the Defendant having Notice of the Statute that was Aſſigned to the Lord *Huntington*, endeavours, as was alledged, to get

ſome of the next of Kin to the Conuſee of the Firſt Statute to take out Letters of Adminiſtration *de bonis non* of the ſaid Conuſee of that Statute, to the intent that the Defendant might bring a *Scire fac' ad Computandum* againſt them to come to an Account with him upon the Firſt Statute, and pay them off what ſhould be due, if any thing, and to have the ſaid Firſt Statute Vacated, that ſo he might be let in upon his Security: But they declining to accept of ſuch Adminiſtration, he himſelf took out Letters of Adminiſtration *de bonis non* of the ſaid Conuſee, and procured the Officer in the *Petty-bagg* to vacate the ſaid Statute: And now the Lord *Huntington* exhibited his Bill to be relieved againſt the undue vacating of this Statute.

It was Obſerved, That where a Statute is extended, it cannot be tryed in an Ejectment, whether it be ſatisfied or not; but the only Remedy is by a *Scire fac' ad computandum*, or Bill in *Chancery*; But where Land is extended upon an *Elegit*, the Debt and yearly Value appear on Record, and it may be well known when the Debt is paid, and may come in Evidence upon a Tryal, in an Ejectment.

Secondly, It was Obſerved by Mr. Serjeant *Maynard*, That the Plaintiff's Council had much miſtaken the Law in what they affirmed: For the Law was clear and certain, that where a Statute is once extended, there, though the Conuſee afterwards aſſign the ſame, yet nevertheleſs the Conuſee himſelf, his Executors or Adminiſtrators, may releaſe or diſcharge ſuch Statute, and it ſhall be good and binding in Law.

Thirdly, He ſaid, there was a great difference where a Man was firſt a Real Purchaſor without Notice, and then finding Incumbrances to ariſe upon his Eſtate, there, when he was faſt and once in, it was lawful for him to get in what antient Securities he could to corroborate and protect his Purchaſe: But this is quite another Caſe, for here the Plaintiff had bought in this Statute at leaſt two Years

Years before his Purchaſe, and ſo it could not be ſaid to be done for the Protection of his Purchaſe; and inſiſted, that in this Caſe the Lord *Huntington* ought not to be looked upon as a Purchaſor, having before his Purchaſe Notice of the Defendant's Statute; And that a Man having a Real Debt might well ſecure himſelf by getting the Statute thus Vacated, and that being once done, this Court ought not to take from him the Advantage he had in Law.

But it was then inſiſted by the Lord *Huntington*'s Council, that the Defendant ought not to profit by the Art and Skill he had uſed in getting this Statute vacated, the ſame being unduly done, and not according to the courſe of Law, which ſhould have been done regularly by a *Sciré fac' ad computandum:* And the Defendant having intruded himſelf into an Adminiſtration, to which he had no Colour of Right, on pupoſe to defraud the Plaintiff, it ought not to avail him; and if he had been a fair and rightful Adminiſtrator, yet his Inteſtate under whom he comes in, having Aſſigned the firſt Statute for a Valuable Conſideration, tho' the Adminiſtrator, might have a power of Releaſing or diſcharging it in Law, yet he was but as a Truſtee for the Aſſignee, and muſt be anſwerable to him for the Breach of Truſt.

And the Plaintiff's Council inſiſted that they ought to have a Perpetual Injunction to quiet them in the Poſſeſſion: but the Defendant's Council inſiſted, that this Court ought not to Interpoſe and Abridge him of the Advantage he had at Law, he being a real and true Creditor.

Conuſee of a Statute having extended the Land, aſſigns to *J. S.* and dies. One that had a ſecond Statute, gets Adminiſtration, and acknowledges Satisfaction on the firſt Statute.

Lord *Chancellor* declared, that each of their Demands were over rigid. And firſt he declared that the Defendant ſhould not profit by this vacating of the Statute, but that the Plaintiff ſhould be reſtored and put in the ſame Plight, as if this Statute was ſtill in force. But then the Plaintiff muſt go to an Account upon this Statute, and if it was already ſatisfied, or the Defendant would pay what ſhould remain due thereupon, then the Defendant muſt be let in.

Mr.

Equity will relieve againſt this Practice, and put the Aſſignee in the ſame Plight, as if the Statute was ſtill in Force.

Mr. *Bows* of Council for the Plaintiff urged, that this Statute ſhould lye as a perpetual Cover and Fence to this Eſtate, and that all the Profits of the Eſtate received ſince the Purchaſe ſhould be taken to be received as a Purchaſor only, and not be applyed towards Satisfaction of this Statute; and the rather, for that although the Statute was once extended, yet the Plaintiff had not Poſſeſſion by vertue of this Statute, but by reaſon of his Purchaſe.

But that was utterly denied by the Lord *Chancellor*, For that no Purchaſor ſhould be further or longer protected by an Incumbrance bought in, than till ſuch time only as he had received ſo much of the Profits as would ſatisfy that Security, and that then the ſame ſhould be Avoided by a *Scire fac' ad computandum*, or by an Account to be taken in this Court; And his *Lordſhip* was of Opinion, that altho' the Statute in this Caſe was bought in before the Purchaſe, yet that made no difference in the Caſe, but was as good, as if it had been bought in afterwards to protect the Purchaſe, and therefore the Lord *Huntington* ſhould be looked upon as a Purchaſor, having ſuch Security to protect his Purchaſe: And the Favour that this Court allows to ſuch a Purchaſor is, that he ſhall account only according to the extended Value, and not according to the real Value of the Eſtate.

The Council for the Plaintiff ſeeming diſſatisfied with this Direction, the Lord *Chancellor* told them, If all had been ſaid as might have been ſaid in this Caſe, it would not have fared ſo well with them; For it would be a Preſident of very miſchievous Conſequence, that a Man having bought in a Prior Incumbrance, and having notice of a ſubſequent Statute, ſhould then purchaſe the Land with this Notice, and yet have any Protection or Favour ſhewn him in it; and put them in mind of Sir *John Fagg*'s Caſe, which the Defendant's Council could not remember to urge, where he being a Purchaſor came into a Man's Study, and there laid Hands on a

Statute, that would have fallen on his Eſtate, and put it up in his Pocket; and in that Caſe, he having thereby obtained an Advantage in Law, tho' ſo unfairly and by ſo ill a Practice, the Court would not take that advantage from him.

Mildmay verſus *Mildmay.*

Caſe 50.
2 Ch. Rep. 102.

A Man's Anſwer in the Spiritual Court may be read againſt him in this Court.

IN this Caſe the Anſwer of the Defendant in the Spiritual Court being offered in Evidence againſt him here, it was oppoſed by Mr. Serjeant *Maynard*; But Mr. *Sollicitor General* made anſwer, that it was true, Depoſitions againſt a Man in the ſpiritual Court ſhould not be made uſe of here without ſome ſpecial Order for that Purpoſe; But a Man's own Anſwer upon Oath, let it be taken where it will, tho' it were a Voluntary Oath before a Juſtice of the Peace, ſhall be read againſt him here. Mr. Serjeant *Maynard* replied, they ought then to have given them Notice of it.

How far Equity will aid a Wife to recover an Annuity ſettled by the Husband for her ſeparate uſe, after an Elopement and an Offer of the Husband's to cohabit with her.

In this Caſe the Plaintiff having ſettled 50 *l. per Ann.* in Truſt for his Wife, ſhe afterwards obtain'd a Sentence in the Spiritual Court to be divorced from her Husband *a menſa & thoro*, wherein reciting that her Husband had already ſettled this 50 *l. per Ann.* on her, the ſaid Court adjudged to her 50 *l. per Ann.* more for *Alimony*; and now ſhe exhibited her Bill in Chancery, ſuggeſting that her Husband had, on purpoſe to defraud her of this Rent, procured the Tenants to ſurrender their Eſtates, on which the ſaid Rent was reſerved, *&c.* And therefore prayed this Rent might be made good to her by the Decree of this Court.

But the Defendant's Council inſiſting, that this Settlement of the ſaid Rent was only in Truſt for the Husband, and in the Deed there was not any Truſt declared for the Wife, and that in truth ſhe was a very lewd Woman and had eloped from her Husband, and he offering

ing to take her again in his Anſwer: Lord *Chancellor* would make no Order in it, but only that the Defendant ſhould ſtand in the Place of the Tenants, and ſhould Admit the Rents payable by the Tenants to be ſtill in being, and then ſhe might proceed at Law and recover the Rents there if ſhe could.

Caſe 51.

The King verſus *Carew.*

The Court of *Chancery* has an Admiral Juriſdiction. Letters of *Repriſal* may be repealed in *Chancery* after a Peace, tho' there is a Clauſe in the Letters Patent, that no Treaty of Peace ſhall prejudice them.

THE Caſe was, that the Defendant *Carew* as Executor to *J. S.* being intitled to Letters of *Repriſal*, that were granted by the King to the Defendant's Teſtator for a great Sum of Mony, (In which Letters Patents was a Clauſe that no Treaty of Peace ſhould prejudice them,) and the King having by ſeveral Treaties of Peace with the *Dutch* expreſsly Articled, that they ſhould not be Prejudiced by theſe Letters Patents; the Queſtion was, Whether the King could by any Treaty of Peace *amortize* theſe Letters Patents, and ſo deprive the Party of the Intereſt that was thereby veſted in him.

Mr. *Wallop* of Council with the Defendant inſiſted on time to argue it, being a weighty Point that might well bear a great Debate.

But the Lord *Chancellor* would not hear of it, ſaying, that the *Dutch* Ambaſſador never came into the King's Preſence, but he was making freſh Complaints; and that it was a Caſe for which there could be nothing ſaid, and that the Caſe was very proper in *Chancery* for the Repealing of theſe Letters Pattents; For tho' the Bar were not ſo well appriſed of it, yet the *Chancery* had Admiral Juriſdiction by the Statute of 31 *H.* 6. Num. 66. or 68. which was never printed. And in Proof that a Treaty of Peace might Revoke and *amortize* Letters of *Repriſal*, his *Lordſhip* ſaid the ſame might be done by a Truce or by Letters of ſafe Conduct, and *a fortiori* by a Treaty of Peace: And that

it

it might be done by Letters of ſafe Conduct he cited the Statute of 11 *H.* 4. *Rott.* 66. and a Judgment of the like nature given in the Parliament of *France*, and the like Judgment given in the Parliament of *England*, 2 *H.* 5. Num. 34. And for an Authority that a Truce had the like effect upon Letters of *Repriſal*, he cited the Roll of Parliament 10 *H.* 6. Num. 34. where the *Danes* after a Truce made with them had ſeiſed *Engliſh* Ships by colour of Letters of *Repriſal*, there being no Proviſion made againſt them in the Truce, and the Parliament there petitioned the King for Letters of *Mart* againſt the *Danes*.

Vid poſt. Caſe 116.

The Attorney General on the behalf of Peter Houſe College *in* Cambridge, *&c. againſt the* Margaret *and* Regius Profeſſors *in* Cambridge, *&c.*

Caſe 52.

THE Caſe was, a Man having deviſed 50 *l. per Ann.* for a Lecturer in *Polemical* or *Caſuiſtical* Divinity, ſo as he was a Batchelor or Doctor in Divinity, and *Fifty* Years of Age, and would read five Lectures every Term, and at the end of every Term would deliver fair Copies of the ſame to be kept in the Univerſity, and in default of ſuch a Lecturer, he gave that 50 *l. per Ann.* to College in *Oxon.*

Court refuſed to mitigate or alter the Terms, on which a Lectureſhip for reading in *Polemical* or *Caſuiſtical* Divinity in *Cambrige*, was founded.

Now upon this Information, the Univerſity of *Cambridge* with the Conſent of the Heir at Law would have had the Rigour of the Qualifications mitigated, *viz.* That a Man of *Forty* Years of Age might be made Capable of this Salary, and that *Three* Lectures every Term might ſerve turn, and that if he delivered ſuch fair Copies of his Lectures once a Year it ſhould be ſufficient.

But the Lord *Chancellor*, tho' no one made Oppoſition to it, refuſed to intermeddle in it; and ſaid they ſhould be held to the Letter of the Charity, and that the Heir had no Power to alter the Diſpoſition made by his Anceſtor.

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Term. S. Trinitatis,

34 *Car' II.* 1682.

In Curia Cancellariæ.

Sir Tho. Harvey verſus *Ralph Mountague Ar'.* Caſe 53.

2 Ch. Rep. 82

The Defendant having Notice of a Decree, to which he was no Party, pays Mony contrary to that Decree. Ordered that he ſhould pay the Mony over again.
Vid. poſt. Caſe 113.

THE Caſe was thus. *Harvey* having by his Will appointed the Lady *Harvey* and Sir *Tho. Harvey* Executors: By a former Decree the Lady *Harvey* was to receive no more of the Eſtate, and Sir *Tho. Harvey* to have a Perpetual Injunction againſt her, and a Clauſe was inſerted in the Decretal Order, that no Creditor ſhould pay her any more Mony.

The Teſtator had a Mortgage for 10000 *l.* on part of Mr. *Mountague*'s Eſtate. And Mr. *Mountague*, after notice of this Decree (he being preſent at the Hearing, *&c.*) but before any Sequeſtration againſt the Lady *Harvey*, pays in this 10000 *l.* and Intereſt to the Lady *Harvey*, and has his Mortgage delivered up to be Cancelled: And now a Bill was brought againſt him by Sir *Tho. Harvey*, to compel a Repayment of this Mony.

It was inſiſted, that it was a very hard Demand in Equity to have the ſame Mony twice paid, he having in this Caſe paid it to a Hand that by Law was impowered to receive it, and to her who had his Securities in her Hand; and the Notice, that they pretend of the Decree, is not any

legal Notice: But regularly he ought to have been made a Party to the former Suit, in which the Lady *Harvey* was Decreed not to Intermeddle with the Eſtate, or at leaſt to have been ſerved with an Order not to have paid the Mony to the Lady *Harvey*.

But on Behalf of the Plaintiff it was Anſwered, That this was full Notice to Mr. *Mountague*, and a pure Voluntary Payment in him on purpoſe to prevent and avoid the Decree of this Court.

Caſe 54.

Burdett verſus *Rockey*.

A Sequeſtration which Iſſues as meſn Proceſs, determines by the Death of the Party. Otherwiſe, if it iſſues after a Decree, tho' for a Perſonal Duty.

A Sequeſtration, that Iſſues as meſn Proceſs of the Court, will be diſcontinued, and determined by the Death of the Party: But where a Sequeſtration Iſſues in Purſuance of a Decree, and to Compel the Execution of it, there tho' the ſame be for a Perſonal Duty, it ſhall not be determined by the Death of the Party.

It was Objected, that it was but for a Contempt that a Sequeſtration Iſſues, and that the Principal Intent thereof is to bring the Party to a Compliance, and not to levy the Duty; tho' *that* be Collaterally done.

A Sequeſtration binds from the time of awarding the Commiſſion, and not only from the time of Executing it.

Lord *Chancellor*, The Sequeſtration binds from the very time of awarding the Commiſſion, and not only from the time of Executing of it and its being laid on by the Commiſſioners: For if that ſhould be admitted, then the Inferior Officer would have *ligandi & non ligandi poteſtatem*.

Caſe 55.

Strode verſus *Little*.

Bill for an Account of the Profits of *Mendippe* Mines. Defendant

ON a Demurrer and Plea to a Bill to have an Account of the Profits of the *Mendippe* Mines in *Somerſetſhire*; They plead a Special Act of Parliament which had given

given Juriſdiction of all Matters ariſing within the Mines to the Courts of Excluſive of all other Juriſdiction: And it was urged that this was like to the Juriſdiction of the Sewers, where this Court could not Intermeddle: But it was Anſwered it was not like that Caſe; becauſe there was a new Juriſdiction created and reſerved intire within it ſelf: But here the Juriſdiction of determining Matters relating to theſe Mines is transferred to the Courts of which were antient Courts, in which by the Common Law this Court did interpoſe in Equitable Matters.

pleads an Act of Parliament, which had given an Excluſive Juriſdicton of all Matters ariſing within the Mines to the Courts of A, but had not averred there was a Court of Equity there. Plea over-ruled.

Lord *Chancellor*, The Plea is not good, becauſe altho' you plead an Excluſive Juriſdiction, yet you do not aver that there is any Court of Equity there.

Anonimus.

Caſe 56.

ON a Demurrer. Reſolved: that where a Man Exhibits a Bill for Diſcovery of a Deed, and prays in his Bill a Diſcovery only, there a Man muſt make Oath he hath loſt the Deed. But where a Man comes, and ſets forth the Loſs of his Deed, and prays to be relieved touching the Duty coming to him by the Deed, there he needs not make ſuch Affidavit.

In what Caſe a Man muſt make Oath of the Loſs of a Deed, where he brings a Bill touching this Deed.

Vid. poſt. Caſe 175 & 241. 1 Ch. Rep.

DE

Term. S. Michaelis,

34 *Car' II.* 1682.

In Curia Cancellariæ.

Caſe 57.

Anonimus.

If the Executor of a Parſon brings a Bill for Tythes, he need not offer to accept the Single Value, he not being intitled by the Statute of *Edw.* 6. to the treble Value.

UPON a Demurrer: a Man having brought a Bill for Tythes, the Defendant demurred, for that he had not offered by his Bill to accept of the ſingle Value, and yet had alledged in the Bill, that the Defendant had carried away the Corn, *&c.* without ſetting forth the Tythes according to the Statute; and it was inſiſted for the Defendant, that if he ſhould be put to anſwer this Bill, the Plaintiff would preſently go to Law, and give his Anſwer in Evidence, and recover the treble Value of the Tythes; and a Court of Equity ought not to aſſiſt a Man in recovering a Penalty, nor compel a Diſcovery of a Forfeiture.

Afterwards at another Day upon a Motion this Demurrer was over-ruled, the Plaintiff in this Caſe being only the Executor of a Parſon, and not the Parſon himſelf, and ſo not intitled to a Forfeiture upon the Statute.

Caſe 58.

Bovey verſus *Smith.*

2 Ch. Rep. 124.

Truſtee ſells the Land to one, who had

A Truſtee having ſold the Land to a Stranger, that had no Notice of the Truſt, and a Fine with Proclama-

clamations and five Years paſt, the Truſtee afterwards, for valuable Conſideration really paid, purchaſes theſe Lands again of the Vendee. And it was Decreed by the Lord *Chancellor*, with the concurring Opinion of the Lord *Chief Juſtice North*, That the Truſtee, notwithſtanding the Fine, Proclamations and Non-claim for five Years, ſhould ſtand ſeized in Truſt as at firſt, as if the Land had never been ſold, nor any Fine levyed.

no Notice of the Truſt, and after a Fine and Five Years non claim repurchaſes the Land. Decreed he ſhould ſtand ſeized in Truſt, as before the Sale. *Vid. poſt. Caſe* 74 & 139.

Jenks verſus *Holford.*

Caſe 59.

THE Plaintiff Exhibited his Bill, ſetting forth, that his Wife's Father was a Citizen of *London*, and that he had not Advanced her in his Life-time, and demanded her Cuſtomary Part, and prayed an Account.

Sums of Mony given by a Freeman of *London* to a Daughter, if not given as a Marriage Portion, or in purſuance of a Marriage Agreement, no Advancement; but however muſt be Caſt into *Hotch-pot*.

In this Caſe the Points inſiſted on were: *Firſt*, That the Plaintiff's Wife was Advanced by her Father in his Life-time, he having given her *Four hundred Pounds*. But the Lord *Chancellor* was of Opinion, that it could not be any Advancement, unleſs it had been given her as a Marriage Portion, or in Purſuance of a Marriage Agreement; and the *Four hundred Pounds* were not given till a long time after her Marriage, and without any Agreement that the ſame ſhould be for her Marriage Portion, and was a free Gift; great part of the Sums that made up the *Four hundred Pounds* being given her at Chriſtenings and Lyings-in.

Secondly, It was inſiſted on by the Defendant's Council, that theſe ſeveral Sums, howſoever given, ought, if the Plaintiff will come in for his Wife's Cuſtomary Part, be caſt into *Hotch-pot*; But the Plaintiff's Council denied it, and took a difference betwixt a free Gift ſubſequent to the Marriage, and where the ſame is given in Marriage; and compared it to the Caſe of an Heireſs, where ſhe has Lands given her in *Frank Marriage*, thoſe muſt be caſt into *Hotch-pot*; but otherwiſe if it is of Lands conveyed or given to her

by her Father or other Anceſtor after the Marriage. *Sed non allocatur.*

The *Third* Point was, that the Plaintiff's Wife's Father having been a great Chymiſt and ſpent great part of his Eſtate in that Study, he had (as was pretended) arrived to great Knowledge therein, and had a little before his Death given ſeveral Receipts to the Defendant *Holford*, (who had married his other Daughter,) to a very great Value, as the Plaintiff pretended, and alledged that the Defendant made 500 *l. per. Ann.* certain Profit of the ſame; and to incline the Court to think they were of ſuch Value, the Plaintiff offered to give the Defendant 500 *l.* for his Intereſt in the ſaid Receipts; and therefore inſiſted, that theſe Receipts ought to be looked upon as part of his Perſonal Eſtate, and that the Defendant ſhould account for the ſame.

But Mr. *Sollicitor General*, and Mr. *Keck*, of the Defendant's Council replied, It was a Scandal upon the Cuſtom of the City of *London* to make ſuch Receipts and Trifles part of a Citizen's Eſtate, eſpecially ſuch Receipts as theſe, which for ought appears are only to make Strong Water; and they deſired to know how they ſhould come to be reckoned part of a Citizen's perſonal Eſtate: For ſuppoſe he had communicated the Receipts to the Defendant by word of Mouth, and he had writ them down in his own Paper, there had then been no Colour for it; But now this Scrap of Paper muſt be reckoned Part of his perſonal Eſtate; and if they will have an Account for ſo much Waſt Paper, they may take it: And ſuppoſe the Defendant had publiſhed and made common theſe his Choice Receipts, what would then have become of the Property? and how then would they have belonged to a Citizen's Perſonal Eſtate? And this he might have done, and may do, without Injury to any Man: And it is not like a new Invention, for which a Man has a Patent, that none but himſelf for the ſpace of ſo many Years ſhall uſe the ſame;

that may veſt a Property; but in this Caſe there is no Colour for it.

Lord *Chancellor*. I will not ſo far Countenance theſe kind of Receipts (which is only a Piece of Quackery, and ſerves only to cheat the People) as to put a Value on them in *Chancery*. For ought I know, a Receipt to make Mince-Pies or catch Rats may be as valuable. And the Plaintiff not conſenting to caſt into *Hotch-pot* the four hundred Pounds given unto his Wife as aforeſaid, the Bill was diſmiſt.

Chymical Receipts not to be reckoned part of a Free-man's perſonal Eſtate.

Girling verſus *Lee*.

Caſe 60.

GREAT part of the Lands in Queſtion had been ſettled on the Lady *Lowther* for a Jointure by Mr. *Lee* her late Husband, Father of the Defendant; and in the Settlement *Lee* covenants that the Lands were of the annual Value of 800 *l.* and in caſe they ſhould fall ſhort of that Value that his other Eſtate ſhould be liable to ſupply the Defect thereof.

Where an Equity of Redemption or Truſt-Eſtate is deviſed for payment of Debts, all Debts ſhall be paid equally. Otherwiſe, if the Deviſe is to the Executor, for then the Lands will be legal Aſſetts.

After the making this Settlement, all the other Eſtate of *Lee* not comprehended in the ſaid Jointure was mortgaged for 2400 *l.* and afterwards *Lee* acknowledges a Judgment to the Plaintiff, who had wrought for him as his Taylor, and became bound with him in ſeveral Bonds; but the Judgment was defeazanced on Payment of 550 *l.* *Lee* makes his Will, and deviſes all his Lands for Payment of Debts.

The Bill was to have the Truſt performed, and the Plaintiff's Debt ſatisfied. The Defendant in his Anſwer confeſſed the Deviſe for Payment of Debts, but ſets forth the Jointure and Covenant and the Mortgage.

It was inſiſted by Mr. *Sollicitor General* and others of the Defendant's Council, that this Covenant bound the Land,

Land, and was precedent to the Judgment, as was alſo the Mortgage, and that both theſe muſt be ſatisfied before the Plaintiff's Judgment; or at leaſt the Lands being in Mortgage when the Judgment was acknowledged, the Plaintiff could come in but for an Average and his Proportion; in regard his Judgment could not in Law affect theſe Lands, they being then in Mortgage; ſo that it was a Security in Equity only: and they inſiſted, that the Covenant for making up the Jointure ought to be firſt ſatisfied, it being expreſsly charged upon the Land; and they cited a Caſe where a Man Covenanted to ſettle 500 *l. per Ann.* Jointure, and named no Lands in particular, yet there it was held, that the Lands were bound, and that even againſt a Purchaſor; and that if he had afterwards acknowledged any Statute or Judgment, yet this Covenant ſhould be looked upon as a Prior Incumbrance, and was ſo Decreed.

But it was Anſwered by Mr. *Keck*, being of the Plaintiff's Council, that true it is, where a Man Covenants in General to ſettle Lands of ſuch a Value, and names none, there all the Lands ſhall be bound; But where a Man ſettles ſuch and ſuch Lands in particular for a Jointure, and afterwards Covenants that they are of ſuch a Value; there ſuch Covenant binds the Perſon only and not the Land; But this Caſe indeed was ſtronger, and did expreſs that the other Eſtate ſhould ſtand Charged to make the Jointure of that Value: But then he obſerved, that it was more than forty Years ſince the Jointure took place, and that in all this time there had been no Demand on pretence of Defect in the Value of the Jointure; and that the Defendant had actually paid other Debts on Bond; ſo that theſe Pretences carried the face of Fraud with them, and ſeemed only to be ſet on foot to fence againſt this poor Man's Debt, who had been *Lee*'s Taylor and Bonds-man. And as to the Objection of Average, he did admit, that generally where Lands are deviſed for Payment of Debts, there all ſorts of Securities, whether Statutes, Judgments, Bonds or ſimple Contract Debts, if they do not in their own nature affect

affect the very Land ſo deviſed (as a Judgment cannot, if the Land be then in Mortgage or the like) there all Debts ſhall be paid in Proportion and by Average; and ſo of other Equitable Incumbrances: But then there is this Difference, If the Deviſee of the Lands in Truſt for Payment of Debts be alſo made Executor, then do the Lands ſo deviſed become legal Aſſetts; and then Debts muſt be paid according to their Precedency or Superiority at Common Law: and ſo it was reſolved in the Caſe of *Hixine* and *Mortly*, which was agreed to be Law of all ſides; and this Caſe being ſo, it was Decreed that the Lands ſhould be ſold according to the Truſt in the Defendant's Father's Will for Payment of Debts, and the Plaintiff be let in for a Satisfaction of his Judgment, without regard had to the Covenant for making good the Jointure.

Peiton verſus *Banks.*

Caſe 61.

A Man by Will deviſes Lands to his Wife for Life, and as to the ſaid Lands he gives the Reverſion to *A.* and *B.* to be equally divided betwixt them.

Deviſe to *A.* for Life, the Reverſion to *B.* and *C.* to be equally divided betwixt them. *B.* and *C.* Tenants in Common for Life only.

The Queſtion was, what Eſtate *A.* and *B.* ſhould take by this Deviſe.

Decreed, they were Tenants in Common for Life only.

Serjeant *Maynard* (tho' not of Council in the Caſe) told us at the Bar, he remembred the like but a ſtronger Caſe ſo reſolved above twenty Years ſince. *viz.* A Man having given Lands to his Wife for Life, deviſes the Reverſion to *A.* and *B.* *A.* in that Caſe being his Heir at Law: yet adjudged, that by the Deviſe *B.* took an Eſtate for Life only.

2 Ro. Abr. 834 Ca. 13.

Caſe 62.

Frankland verſus *Hampden.*

Forged Deeds or Writings not to be ordered *per Cur'* to be torn or defaced, but kept ſo, that the King may proceed thereon againſt the Criminal.

THE Plaintiff this day making Default, and upon Opening of the Cauſe it appearing that the Plaintiff had Forged ſeveral Notes or Writings in the Defendant's Name; it was prayed by the Defendant's Council, that ſuch Bills or Notes might be torn or obliterated: But Mr. *Solicitor General* obſerved to the Court, that a Forged Deed or Writing cannot be torn or defaced by Law, but muſt be kept ſo, that the King may proceed upon it againſt the Criminal.

Caſe 63.

Gibſon & Ux' verſus *Kinven & al'.*

Perſonal Eſtate Deviſed to the Wife, upon Truſt not to diſpoſe thereof but for the Benefit of her Children. She by Will gives 5 *s.* only to one Child. Decreed the Eſtate to be divided Equally.

THE Caſe was, that one *Harris* in his Life-time being poſſeſſed of a conſiderable Perſonal Eſtate, and having Iſſue four Children, *viz.* two Sons and two Daughters, and *Mary* one of his Daughters being now married to the Plaintiff *Gibſon*, and *Ann* his other Daughter to the Defendant *Kinven*, he made his laſt Will and Teſtament in Writing, and thereby Deviſed ſeveral Particular Legacies to each of his Children, and gave his ready Mony, Goods, Plate and Houſehold Stuff to his Wife, *upon Truſt and Confidence that ſhe would not diſpoſe thereof but for the Benefit of her Children.*

The Wife after the Death of her Husband made her Will, and therein calling herſelf his Executrix and reſiduary Legatee, ſhe gives ſeveral Legacies to ſome of her Children, and but 5 *s.* only to the Plaintiff and her Children, and Deviſes all the reſt of her Eſtate to her Son *Bartholomew.*

The Bill was to be relieved herein, the Plaintiff inſiſting that the Wife having Deviſed all this Eſtate to one of her

Children *only*, this was a void Bequeſt, and a Breach of her Truſt, and that therefore the Plaintiffs ought to be let in to a full third part of the ſaid Father's Eſtate intruſted with the Mother as aforeſaid; one of the ſaid Brothers after the making of the ſaid Father's Will dying in his Life-time.

The Defendants by Anſwer confeſſed the Will of *Harris* the Father, and did admit that one of the Brothers was dead in his Life-time; But ſet forth further that the Plaintiff had by ſome means diſobliged her Mother in her Life-time: And tho' they had endeavoured to reconcile them, and to perſwade the Mother to leave the Plaintiff her Daughter a better Legacy, yet they could not prevail with her to do it. And further ſay, that about three Months ſince, to prevent Diſputes there was a Caſe touching this matter drawn up, and agreed to by the Plaintiffs, and referred to Sir *Francis Pemberton*, now Lord *Chief Juſtice* of *England*, to determine, who gave it as his Opinion, that, notwithſtanding the Words in the Will, *viz. upon Truſt and Confidence that ſhe will not diſpoſe thereof but for the Benefit of her Children*, yet that the Executrix had Power to diſpoſe of the Reſidue to which of her Children ſhe would, and that ſhe was not bound thereby to divide it equally; and that if ſhe had given the Plaintiff her Daughter but a Ring only, it had been good.

After this Cauſe had been much debated, and ſeveral Precedents produced, where in ſuch Caſes very unequal Diſtributions had been approved and ratified by this Court, the Lord *Chancellor* decreed for the Plaintiff; for that the Diſtribution in this Caſe was ſo very unequal, and that without any good Reaſon ſhewn to warrant it: and therefore he thought fit to rectifie it in this Caſe, and could not do it otherwiſe than by decreeing an equal Diſtribution.

Ver-

Caſe 64.

Vermuden verſus *Read.*

4000 *l.* Portion by Marriage Articles ſecured on Land; provided if the Husband did not ſettle a Jointure within two Years, he ſhould have the Intereſt only for his life, and the Land to go to the Wife and the Heirs of her Body. The Wife dies within the two Years, no Settlement being made. Husband not intitled to the Portion. *Vid. poſt. Caſe* 160.

SIR *Compton Read* married his Daughter to the Complainant, and for ſecuring the Payment of 4000 *l.* the Daughter's Portion, did enter into Articles, that the Moiety of a certain Manor of his ſhould ſtand charged with it: But it was provided in the Articles, that in caſe Mr. *Vermuden* did not ſettle upon his Lady within two Years ſuch a Jointure, as by the Articles was agreed to be ſettled, that then the Complainant ſhould have only Intereſt paid him for his Wife's Portion, after the Rate of 50 *s. per Cent.* during his Life, and after his Deceaſe the Lands ſhould go to his Wife and the Heirs of her Body, with a Power of Redemption to Sir *Compton Read* and his Heirs. Sir *Compton Read* dies; and the Complainant's Wife dies within the two Years, he not having ſettled ſuch Jointure, as by the Articles he was obliged to ſettle.

The Plaintiff the Husband exhibited his Bill againſt the Heir at Law of Sir *Compton Read*, to be relieved againſt theſe Articles; And it was alledged on behalf of the Complainant, that the Eſtate tail being limited to his Wife, ſhe might by a Fine levyed in her Life-time have barred this Eſtate tail, and might have ſuffered a Common Recovery of it, and by that means have barred the Remainder man; and that if he had at any time ſettled ſuch Jointure upon his Wife, tho' not within the time preſcribed by the Articles, he ſhould have been relieved againſt theſe Articles, and have had the Portion decreed him.

It was demanded by the Lord *Chancellor*, whether they prayed Relief againſt the Perſon, or endeavoured to charge the Land. If they went againſt the Land, they muſt take it *ſecundum formam Chartæ*; and in this Caſe there being no

no Perſonal Covenant, the Bill was diſmiſt: and it was ſaid to be like the Caſe of *Colonel* Cheeke *and my Lord* Where *Cheeke* by Articles made on his Marriage was to have 4000 *l.* Portion with his Wife; 1500 *l.* paid down in hand, and 2500 *l.* more, if he made a Settlement within the ſpace of *three* Years. It happened that his Lady died within *two* Months after the Marriage, he not having in that time made ſuch Settlement as by the Marriage Articles he was obliged to have made: and he in that Caſe exhibited a Bill to be relieved, and was diſmiſſed.

Q. if the Husband's making the Settlement be not a Condition Precedent to the Payment of the Portion.

Brent verſus *Beſt & al'.*

Caſe 65.

THE Plaintiff exhibited his Bill to redeem. The Caſe fell out to be, that one *Jo. Combes* being ſeized of the Copyhold Lands in Queſtion, and having taken up Mony upon them, and ſecured the Repayment of the ſame by ſeveral Mortgages made of the ſaid Lands, he afterwards ſurrendred them to the Uſe of his laſt Will (which he needed not to have done, for having only an Equity of Redemption he might have deviſed them without the Formality of any ſuch Surrender) and thereby deviſed them to one *Yeates* in Truſt in the firſt Place to pay off and diſcharge the Mortgages on the ſaid Lands, and in the next Place for Payment of ſeveral Legacies, and particularly a Legacy of 200 *l.* unto the Complainant's Wife; the Remainder in Fee to *Yeates*; and makes *Yeates* his Executor. *Yeates* proves the Will, and pays ſeveral Debts owing by his Teſtator, that were not Mortgage Debts; and to raiſe Mony for that purpoſe makes ſeveral new Mortgages of the Lands in Queſtion.

Deviſee of Lands in truſt to pay Mortgages in the firſt Place, and then Legacies, is made Executor. He mortgages to raiſe Mony to pay other Debts of the Teſtator.

Such new Mortgage ſhall take Place of the Legacies.

The Plaintiff being a Legatee in right of his Wife, exhibited his Bill for Satisfaction of his Wife's Legacy, and inſiſted that after the Mortgages made by *Combes* were diſcharged, the Lands then ſhould ſtand charged with his Legacy, and that then he ought to be let into an Imme-

diate Satisfaction thereof, and not be poſtponed by the new Mortgages made by *Yeates*.

But by the Defendant's Council it was inſiſted, that the Plaintiff could not be admitted to redeem part, without redeeming the whole. And the Land ſtands charged as well with the Mortgages made by *Yeates*, as with thoſe made by *Combes*; and in this Caſe *Combes* was not only a Truſtee for Payment of Debts, but alſo Executor to the Deviſee, and ſo the Lands in his hands became legal Aſſetts, and charged with all the Debts of the Teſtator, and by conſequence with the new Mortgages made by *Yeates*, the Mony having been raiſed and applied for Payment of the Debts of the Teſtator.

But it was replied, *that* was ſo, where a General Truſt is raiſed for Payment of all Debts, but in this Caſe *Yeates* was a ſpecial Truſtee, and directed by the Will to pay off the Mortgages, and then the Legacies, and no Proviſion was made for other Debts. *Sed non allocatur.*

In this Caſe *Combes* having mortgaged part of his Copyhold Lands in Fee, being Cuſtomary Lands of Inheritance, unto one *Beſt*: *Beſt* ſurrenders them to the uſe of his Will, and deviſes to his Wife for Life, Remainder in Fee to the Defendant *Barnaiſh*, and makes his Wife Executrix; and it was prayed on his behalf, that if the Plaintiff redeemed, the Defendant *Barnaiſh* might have a proportionable ſhare of the Redemption-mony, according to the Value of the Eſtate he had in the Land: And the matter in fact appearing to be ſo upon the Pleadings, altho' the Defendant had no Croſs Bill for that purpoſe, nor ſo much as inſiſted upon it in his Anſwer, it was ordered by the Lord *Chancellor*, that the Defendant *Barnaiſh* ſhould have his Proportionable Part of the Redemption-mony. And the ordinary Rule of the Court in ſuch Caſe was ſaid to be, that one third of the Mony ſhould be paid to the Tenant for life, and the two thirds reſidue to the Remainder Man. *Fer-*

Mortgagee in Fee deviſed the mortgaged Lands to A. for Life, Remainder to B. in fee. A. ſhall have one third and B. two thirds of the Mortgage mony.

Ferrars verſus *Ferrars.*

Caſe 66.

A Bill was exhibited to be relieved againſt an Action at Law; and upon a Motion for an Injunction, the Caſe appeared to be:

The Husband's Executors are ſued at Law for Goods bought by the Wife in her Husband's Life-time, while ſhe lived ſeparate, and had a ſeparate Maintenance, and this known to the Tradeſman that ſold the Goods. Bill brought for Relief. Injunction deny'd, it being a proper Defence at Law.

The Lady *Ferrars*, the Defendant, lived ſeparate from her Husband, and had a ſeparate Maintenance allowed her by her Husband, and took a Houſe in *London*, and bought Goods and other Furniture of the Plaintiff at Law, for Furniſhing of the ſaid Houſe: And now the Executors of her Husband, being ſued at Law for theſe Goods bought by her, whilſt ſhe lived apart from her Husband, and had a ſeparate Maintenance (which was, as the Plaintiffs Council alledged, well known to the Plaintiff at Law, of whom ſhe bought theſe Goods) brought their Bill in Equity to be reliev'd againſt this Action, inſiſting that the Plaintiff's at Law ought not to charge the Husband or his Executors for theſe Goods.

But the Equity not being confeſſed by Anſwer, the Defendants ſwearing that the Wife's living ſeparate was with her Husband's good liking and by his Direction; and that they (the Defendants) hoped to prove that ſhe was directed by her ſaid Husband to buy theſe Goods, and that he declared he would pay for them:

Upon hearing Council on both ſides an Injunction was denied, it being after a Verdict, and for that the Plaintiff's Bill contained no Equity; and their Allegations, if true, would have been a proper Defence at Law.

In debating this Matter was cited *Scot* and *Manby*'s Caſe. 1 Sid. Rep. 159.

Far-

Caſe 67.

Farrington verſus *Chute & Ux'.*

Bill for an Account of a Copartnerſhip. Defendant Pleaded an Award, averring the Matter in Queſtion comprized in the Award. Plaintiff replyed Generally to the Plea; and tho' the Plaintiff ought to have ſet down the Plea to be argued, and not to have replyed to it, yet Court Decreed Defendant to Account. But afterwards, tho' this Decree was Sign'd and Inroll'd, Court order'd Defendant only to Anſwer over.

THE Plaintiff's Bill being to have an Account of a Trade in Copartnerſhip between his Teſtator and one *Baker*, the Defendant *Chute*'s Wife's former Husband; which ended about twenty Years ſince:

The Defendant pleaded an Award in Bar, and Averred, that the Matter in Queſtion was Comprehended in the Award.

The Plaintiff replied Generally, that there was no ſuch Award.

This Cauſe had been twice heard upon the Plea, and each time the Plea adjudged againſt the Defendant by the Lord *Chancellor*, he conceiving the Plaintiff's preſent Demand, by reaſon of an Exception in the Award, not to be therein comprehended, and directed the Defendant to Account.

It was this day moved by Mr. *Keck*, that the Plaintiff in ſtrictneſs had concluded himſelf, and by the Forms of the Court was ouſted of his Demand; For having replied Generally to the Plea, that there was no ſuch Award, this admitted the Plea to be a full Bar, if the ſame were proved to be true; and the Plaintiff muſt take it as the Defendant has Pleaded it, with the Averment, that the Matter in Queſtion is comprehended in the Award, ſo that in ſtrictneſs the Plaintiff was concluded, and the Defendant had nothing more to do, but only to prove, that there was ſuch an Award: However he declared, they were willing to relinquiſh this Advantage, altho' he cited a Caſe in Point, where a very honeſt and equitable Demand was loſt upon this very thing, and tho' it was a Caſe of Extremity, the Plaintiff there could never get over it; but it was ruled againſt him upon long and great Debate. But then if the

Defendant waved this Advantage, he muſt not be in a worſe Condition for the Plaintiff's Miſtake, who ought to have replied Specially, that the Matter in Queſtion was not Comprehended in the Award; and then the Defendant had been at Liberty to Corroborate his Plea by Proof, which he was now ouſted of; And that in truth there ought to have been in this Caſe, upon the over-ruling of the Plea, a *Reſpondeas ouſter* awarded, and not an Account immediately directed; And therefore inſiſted that the Defendant might be at Liberty to Anſwer, or that the Cauſe might be reheard (which indeed was the only Point aimed at)

But Mr. *Sollicitor General* for the Plaintiff anſwered, that upon the General Replication it was not to be taken that no Award at all was made, but that there was no ſuch Award as the Defendant had pleaded, including the Plaintiff's Demand; and the Defendant had failed in producing any ſuch Award, his Lordſhip having adjudged that the Award by them produced on hearing of the Plea did not include the Trade of which the Plaintiff demanded an Account. And Sir *Jo. Churchill* inſiſted, that where a Man pleads in Abatement only, there indeed upon the over-ruling of his Plea only a *Reſpondeas ouſter* ſhall be awarded: But where a Man pleads a Plea in Bar, as in this Caſe, the ſame is peremptory.

The Reſult of the Debate was, that the Defendant ſhould anſwer, and be at Liberty to Corroborate the Matter of his Plea by Proof.

Anonimus.

Caſe 68.

Statute of Limitations attaches the Demand pending a Suit in Equity for the ſame.

UPON a Motion, the Lord *Chancellor* declared, that if a Man Sued in Chancery, and pending the Suit here, the Statute of Limitations attached on his Demand, and his Bill was afterwards diſmiſſed, as being a Matter Court of Equi-

ty won't ſuffer the Statute of Limitations in ſuch Caſe to be pleaded at Law.

properly determinable at common Law; in ſuch Caſe his Lordſhip would take care to preſerve the Plaintiff's Right, and would not ſuffer the Statute to be pleaded in Bar to his Demand.

Caſe 69. *Charles Weſt, Arm'*; verſus Lord *Delaware* and Sir *Jo. Cutler.*

Two Defendants to a Bill: one of them puts in an inſufficient Anſwer, which is ſo reported, and on Exceptions to Maſter's Report confirm'd. Afterwards the other Defendant puts in the like inſufficient Anſwer. Court for avoiding delay will judge on the Inſufficiency of this Anſwer, without ſending it to a Maſter.

THE Plaintiff being the Lord *Delaware's* eldeſt Son, exhibited a Bill to be relieved touching ſome Articles made on his Marriage, his Father having received nine thouſand Pounds of his Wife's Portion, and yet refuſed to make any Settlement, but took Advantage of a Defect in the Marriage Articles; and in order to be relieved thereon, pray'd a Diſcovery of the Incumbrances on his Father's Eſtate agreed to be ſettled on the Marriage.

Sir *Jo. Cutler* had formerly Anſwered, that the Plaintiff by the Articles made on his Marriage had no Title to the Eſtate in Queſtion, and therefore inſiſted he was not bound to diſcover the Incumbrances.

Upon Exceptions taken to this Anſwer, the Maſter reported the Anſwer inſufficient; and upon Exceptions taken to the Report, the Report was confirm'd by the Lord *Chancellor*, who ordered that the Defendant ſhould anſwer as to the Incumbrances.

After this, Lord *Delaware* put in juſt ſuch another Anſwer, and inſiſted upon the ſame Matter.

The Plaintiff, to avoid delay, ſought by the Defendants (inſtead of excepting to the Lord *Delaware's* Anſwer, and getting a Report upon it, and then waiting for Exceptions to the Report, and bringing thoſe on before the Court for Judgment, as the Plaintiff had before done with Sir *Jo. Cutler's*

Cutler's Anſwer) Petitioned the Lord *Chancellor*, that the Matter might be immediately brought before him for his Judgment on the Inſufficiency of this Anſwer, which was put in purely for Delay; and the Petition having been granted, it was now moved to diſcharge that Order, alledging, that it introduced a new form in the Court, and it muſt needs bring great and unneceſſary Trouble on his Lordſhip, and many other Inconveniences, not now foreſeen, might enſue upon it; and by this means *Maſters in Chancery* would in a great meaſure become uſeleſs: And the Courſe of the Court is the Law of the Court; and that is the Law of the Land, and ought not to be varied or changed for any Man's particular Conveniency. *Sed non allocatur*; and the Lord *Chancellor* declared, he would without more ado be attended in this Matter.

Comes Arglaſſe verſus *Muſchamp.*

Caſe 70.

THE Plaintiff having exhibited his Bill to be relieved againſt the Grant of an Annuity or Rent-charge of 300 *l. per Ann.* charged upon his Lands in *Ireland*, ſetting forth that the ſaid Grant was obtained from the late Earl of *Arglaſſe* by the Defendant *Muſchamp*, upon a fraudulent Practice here in *London*: The Defendant pleaded to the Juriſdiction of the Court, that the Lands lying in *Ireland*, the Matter was properly examinable in the Court of Chancery there, and that this Court ought not to interpoſe; Mr. *Wallop* and others of the Defendant's Council arguing, that tho' in extraordinary Caſes the Chancery here might have a Juriſdiction of Matters in *Ireland*, yet in ordinary Caſes it had not; and in Caſe of Contracts made in *London*, an *Iriſh* Man's being occaſionally here, would not intitle this Court to a Juriſdiction, and cited the Doctors of the Civil Law, who treat of Juriſdiction in point of Reſidence ariſing only where a Man commonly inhabits, and where he may be ſaid to have his *Domicil*; and that undoubtedly the Chancery of *Ireland* had a Juriſdiction in this

Court of Equity in *England* will relieve againſt fraudulent Conveyances gain'd of Lands in *Ireland*, when Defendant is in *England*.

Vid. poſt. Caſe 125.

this Caſe, the Lands concerning which the Litigation ariſes lying there: And though all Equity is founded upon general Reaſon, and ſo all Laws are ſaid to be founded upon Reaſon, yet Reaſon doth diverſifie itſelf into ſeveral Laws in each Kingdom, which are made conformable *quoad hic & nunc*; and ſo it comes to paſs, that the municipal Laws of all Countries and Kingdoms differ; and if this Court ſhould aſſume a Juriſdiction in this Matter, the Chancery of *Ireland*, and with greater Reaſon, might do the like; the Conſequence whereof would be, that upon the difference of the Laws of each Nation, different Decrees would be made, and ſo the Juriſdictions might claſh, and their Decrees be repugnant, and the Defendant proſecuted in each Court for the ſame Matter, and yet not able to comply with both: And it's an Argument, that this Court has not a Juriſdiction in this Caſe, becauſe it is deficient in Power, as this Caſe is, to execute its own Decrees, for this Court cannot award a Sequeſtration againſt Lands in *Ireland*.

But for the Plaintiff it was anſwered, that the primary Juriſdiction of this Court is to relieve againſt Frauds and Cheats, and the Fraud by the Bill charged ariſes here, and if the Laws of *Ireland* ſo far differ from the Laws here, (which they hoped they did not,) as to allow of a Fraud or Cheat, this Court had then the greater Reaſon to retain this Cauſe, and ſee Juſtice done. And there could be no fear of different Decrees, for it would be a good Plea there, that this Court was poſſeſſed of the Cauſe, and had decreed in it. And as now they endeavour to ouſt this Court of its Juriſdiction, becauſe the Lands lye in *Ireland*, they might much better plead there, that the Fraud aroſe in *England*. And as to what was objected, that this Court had not Power in this Caſe to compel an Execution of its Decree, which if admitted, were the Unhappineſs of the Suitors only, and could be no Grievance to the Defendant; yet they would in this Caſe content themſelves with the Defendant's Perſon, in caſe no Sequeſtration was to be had.

Lord

Lord *Chancellor.* This is ſurely only a Jeſt put upon the Juriſdiction of this Court by the Common Lawyers; for when you go about to bind the Lands, and grant a Sequeſtration to execute a Decree, then they readily tell you, that the Authority of this Court is only to regulate a Man's Conſcience, and ought not to affect the Eſtate, but that this Court muſt *agere in Perſonam* only; And when, as in this Caſe, you proſecute the Perſon for a Fraud, they tell you, you muſt not intermeddle here, becauſe the Fraud, tho' committed here, concerns Lands that lie in *Ireland,* which makes the Juriſdiction Local; and ſo would wholly elude the Juriſdiction of this Court. But certainly they forget the Caſe of *Archer* and *Preſton*; in which Caſe, if in any, the Juriſdiction was Local, the matter there being not only for Land that lay in *Ireland,* but of a Title under the Act of Settlement there; yet the Defendant coming into *England,* a Bill was exhibited againſt him here, and a *ne exeat regno* granted, and he put to anſwer a Contract made for thoſe Lands; and when he departed into *Ireland* without anſwering, he was ſent for over by a ſpecial Order from the *King,* and made to anſwer the Contempt, and to abide the Juſtice of this Court; for the *King* will maintain the Authority of his Courts, when they act according to Law and Reaſon.

The Plea was over-ruled, and the Defendant ordered to pay Coſts for endeavouring to ouſt the Court of its Juriſdiction.

Vid. the Caſe of Lord *Kildare* and Sir *Morrice Euſtace.* 2 Ch. Rep. 188.

Wilcox verſus *Sturt.*

Caſe 71.

UPON a Plea, The Bill was to be relieved for a ſum of Mony ſecured to the Plaintiff by a Mortgage, and for which Bonds were alſo given by the Defendant.

Defendant pleads that the Plaintiff in Equity brought an Action at Law for the thing in Queſtion, and on full Evidence was nonſuited.

As to the Bonds, the Defendant by way of Anſwer ſet forth, that the ſame were delivered by the Defendant

as *Eſcrows* only for the Plaintiff's Uſe, to be delivered over to the Plaintiff, upon the Plaintiff's giving a Releaſe, which he refuſed to do. And the Defendant pleaded that the Plaintiff upon full Evidence was nonſuited in an Action of Trover brought at Law for thoſe Bonds.

It was urged by the Plaintiff's Council that a Non-ſuit was a new ſort of Plea, and it was no Bar even at Law, much leſs ought it to be ſo taken in Equity, and it looks odd, that when the Plaintiff comes and complains that he has no Remedy at Law, the Defendant ſhould tell the Plaintiff, that the Plaintiff is without Remedy at Law, and therefore he ſhall not be relieved in Equity: And if Non-ſuits, which often happen upon trivial Miſtakes, and many times upon Accidents, ſhould be admitted as Bars in Equity, it will make an End of a great many Caſes.

As to the Validity of the Plea no certain Rule was given: But Lord *Chancellor* ſaid, in this Caſe you ſhall have no Decree for the Duty on the Bond as upon Bonds loſt or torn; But you ſhall be at liberty to give the Bonds in Evidence to prove the Debt ſecured by Mortgage. In which Rule each Side ſeemed to acquieſce.

Caſe 72.

Durdant verſus *Redman.*

Where a Defendant has demurred, he may aſſign another Cauſe of Demurrer at the Bar, paying Coſts, and if ſuch Cauſe of Demurrer is over-ruled, he ought to pay double Coſts.

But when a Defendant has pleaded, and there is no Demurrer in Court, he can't demur at the Bar, tho' he would pay Coſts.

IN this Caſe the Defendant having pleaded a frivolous Plea, Mr. *Steadman* of Council with the Defendant offered to demur at the Bar for want of Parties.

But Mr. *Keck* of Council for the Plaintiff inſiſted, that if he would demur at the Bar, he muſt by the Rules of the Court pay Coſts before he be heard; which Mr. *Steadman* conſenting to, he went on and opened his Demurrer, and ſhewed a ſufficient Cauſe of Demurrer.

But then Mr. *Keck* told him, his Demurrer could not be received, for that a Man cannot demur at the Bar, un-

unleſs there be a Demurrer in Court, and in this Caſe the Defendant had Pleaded only; and thereupon the Plea was over-ruled, and the Demurrer diſallowed: And in ſtrictneſs the Defendant ought to have paid double Coſts.

Alexander Popham verſus *Bampfeild & al'.*

Caſe 73.
13 *Novembris* 1682.
In Court.
1. *Salk.* 236.

THE Caſe upon the Pleadings appeared to be thus: One *Rogers*, who had married his Neice to the Plaintiff's Father, being ſeized in Fee of Lands of the Value of 1500 *l. per Ann.* deviſed thoſe Lands to the Defendant *Bampfeild* and others for the Payment of his Debts, and after his Debts paid, then in Truſt for the uſe and benefit of the Plaintiff and his Heirs Male; but declared his Will to be, that the Plaintiff ſhould have no benefit of this Deviſe, unleſs Sir *Francis Popham*, the Plaintiff's Father, ſhould ſettle upon the Plaintiff two full thirds of his Eſtate ſettled on the ſaid Father on his Marriage, and in default thereof, Deviſed the ſaid Eſtate to his Truſtees; or in Caſe the ſaid Sir *Francis* ſhould make ſuch Settlement, yet then, if the Plaintiff ſhould happen to die without Iſſue, in ſuch Caſe likewiſe he gave the ſaid Eſtate to his Truſtees, diſcharged of the Truſt for the Plaintiff.

Deviſe of Lands to Truſtees to the uſe of Plaintiff and his Heirs Male, in caſe Plaintiff's Father ſettle 2 thirds of the Eſtate which was ſettled on Plaintiff's Father on his Marriage, and in default thereof, or in caſe of Plaintiff's Death without Iſſue, Truſtees to hold the Lands to their own uſe.

The Plaintiff's Father in his Life-time, that he might intitle the Plaintiff, his Son, to this Deviſe, makes a Settlement of his Eſtate, with a Power of Revocation.

Plaintiff's Father *per* Will deviſes all his Lands, being 6000 *l. per Ann.* charged with 30000 *l.* Debts, to his Son the Plaintiff for Life, remainder to his firſt, *&c.* Son in tail Male.
This is a good Performance of the Condition.

And the now Defendants the Truſtees exhibited a Bill againſt Sir *Francis*, to compel him to make a Settlement according to *Rogers*'s Will.

In anſwer to which Bill, the ſaid Sir *Francis* ſets forth, that he had made a Settlement of his Eſtate, and, as he conceived and was adviſed, purſuant to that Will; but however, in caſe the Court ſhould not think that Settlement ſufficient, and according to the Intent of the Will, he

Vid. poſt. Caſe 159.

he was ready and willing to make ſuch Settlement as the Court ſhould direct; and within ſome ſhort time afterwards, and before any thing further had been done in this Cauſe, he dies, having firſt made his Will, and thereby revoked all former Settlements, and deviſed all his Eſtate to the Plaintiff, his Son, in the firſt place for the Payment of Debts, and then to the Plaintiff for Life, and then to his firſt, ſecond, third, and ſo to his tenth Son in tail, *&c.* which whole Eſtate was alledged to be 6000 *l. per Ann.* and the Debts not above 30000 *l.*

Hereupon the Plaintiff, now an Infant, exhibits his Bill to diſcover what Debts the ſaid Truſtees the Defendants had paid, and to have an Account, to the end that the Plaintiff might be let into the Benefit of the Deviſe in *Rogers*'s Will.

It was in the firſt place inſiſted upon by the Defendants Council, that the Plaintiff had no Title to ſue in Equity, for that here was no Truſt, but if he was to take any thing by this Will, the Eſtate was executed to him at Law already by the *Statute of uſes*, the Words being, *in Truſt for the uſe and benefit of the Plaintiff*, and therefore he might ſeek his Remedy at Law.

Which was admitted to be ſo, by the Plaintiff's Council, and by the Court; but however it was inſiſted, that the Plaintiff was proper in Equity, for that he was intitled to have an Account of the Eſtate, and to diſcover what Debts were paid, in order to be let into the ſaid Eſtate.

It was argued by the Defendants Council, that the Plaintiff's Father had undoubtedly a Power to have prevented his Son's having any Benefit of this Deviſe, as in caſe he had abſolutely refuſed to make any Settlement; and it was inſiſted that in this Caſe the Plaintiff's Father had defeated his Son of the benefit intended him by *Rogers*'s Will, as effectually as if he had made ſuch abſolute Refuſal, for that

this was in nature of a Condition precedent, and was not a Condition to diveſt an Eſtate, but the Plaintiff was to take an Eſtate by his Father's performing of this Condition; and this Condition was in no ſort performed; whereas ſuch Conditions in Equity, if not preciſely, yet at leaſt ought to be performed *cy pres*, and eſpecially in this Caſe, the Plaintiff being no Purchaſor, and therefore if the Condition be not ſo performed, as to intitle him at Law, he ought not to be aided in this Court, unleſs there had been ſome Practice in the Defendants to prevent or obſtruct the Performance of this Condition, whereby to gain the Eſtate to themſelves; but of this there is not the leaſt Shadow of Proof: And that the Condition is not in this Caſe performed, is manifeſt; for as to the Settlement made by Sir *Francis* in his Life-time, *that* was with a Power of Revocation, and was actually revoked by his Will; and as for his Will, they did admit, that he might, as this Caſe is, have made a ſufficient Settlement by his Will, and as available, as if the ſame had been by Act executed in his Life-time; But they inſiſted, that by his Will he had not made any ſuch Settlement, as was required; neither as to the Quantity nor Quality of the Eſtate deviſed. For in the *Firſt* Place, the Eſtate was incumber'd with very great Debts, and ſo could in no ſort be reckoned a quiet or compleat Settlement. *Secondly*, One Third of the Eſtate deviſed would not ſatisfy the Debts. And *Thirdly*, By *Rogers*'s Will Sir *Francis* was to ſettle two Thirds of his Eſtate upon the Plaintiff and his Heirs Males, which was a Fee Simple, or at leaſt an Eſtate Tail, being in Caſe of a Will; But here he had deviſed to his Son an Eſtate for Life only: And for an Authority that Equity ſhall not relieve againſt the non-Performance of ſuch a Condition, they cited *Fry* and *Porter*'s Caſe.

But it was anſwered by the Plaintiff's Council, that Mr. *Rogers*'s Intent in this Will appeared to be only to preſerve as great an Eſtate in the Family, as he could, and made this Deviſe with ſuch a Condition, with an Intent

only thereby to oblige the Plaintiff's Father to leave him the greater Eſtate; and the Intent of the Deviſor ought to be chiefly regarded in his Will; and this Condition, which the Teſtator intended for the Benefit and Advantage of the Plaintiff in Equity, ought not to be turned upon him to his Prejudice: And the Intent Mr. *Rogers* had of preſerving an Eſtate in the Family, was better anſwered by the Deviſe in Sir *Francis*'s Will, whereby the Plaintiff is made barely Tenant for Life, than if he had been Tenant in Tail or in Fee: And they inſiſted, that by the Will the Defendants the Truſtees were to requeſt Sir *Francis Popham* to make the Settlement, which for ought appeared they had not done, and ſo they had failed in performing of the firſt Act, and ought not to take Benefit of their own Laches. (*Mes ſemble moy*, that the exhibiting ſuch Bill againſt Sir *Francis* as aforeſaid was a Sufficient Requeſt) And that they were miſtaken, who called this a Condition precedent, for that in truth it was a Condition ſubſequent, for the Eſtate veſted by the Will upon *Rogers*'s death, and Sir *Francis* had all his Life-time after to perform the Condition: And a difference was taken, where the Condition was to be performed by the Party himſelf, who was to have Benefit thereby, and where by a third Perſon.

Lord *Chancellor*. This Deviſe by Mr. *Rogers* to Sir *Francis Popham*'s Family was an Act of great Honour and Gratitude, and yet but a juſt Retribution; for it appears by the Acts of this Court, that Mr. *Rogers* had this Eſtate out of that Family: And altho' this Settlement be allowed to be good, yet ſtill the Truſtees may have a Benefit by this Deviſe, that is, in caſe the Plaintiff, who is now an Infant of tender Years, die without Iſſue.

Firſt, I take it clearly, that this is no Truſt, but an Eſtate veſted at Law, and well executed by the Statute of Uſes; for the Truſt here ariſes out of the Eſtate, and in

in ſuch caſe the Deviſee might by the Statute of 1 *Rich.* 3. have made Leaſes.

Secondly, It is as clear, that this is a Condition ſubſequent, and not a Condition precedent, and that will make a very great difference in this Caſe; For precedent Conditions muſt be literally performed; and this Court will never veſt an Eſtate, where by Reaſon of a Condition precedent, it will not veſt in Law. And ſo it was ruled here in my Lord *Feverſham*'s Caſe, tho' the Lords afterwards reverſed that Decree. But of Conditions ſubſequent, which are to diveſt an Eſtate, there it is otherwiſe: Yet of ſubſequent Conditions, there is this difference to be obſerved, (for againſt all Conditions ſubſequent, this Court cannot, nor ought to relieve) When the Court can in any caſe compenſate the Party in Damages for the non-preciſe Performance of the Condition, there it is juſt and equitable to relieve, as if a Man's Eſtate be upon Condition to pay Mony at a certain Day, and he fails of Payment; But where the Party cannot be compenſated in Damages, it would be againſt Conſcience to relieve; And that was the Reaſon of the Judgment in *Fry* and *Porter*'s Caſe; where the Daughter having married without ſuch Conſent as by the Condition was required, the non-Performance of that Condition could not be compenſated in Damages.

No Relief in Equity, in caſe of a Condition precedent, if not performed.

Equity relieves againſt breaches of a Condition, where Court can make a Compenſation.

As to what has been objected, that the Plaintiff in this Caſe is by his Father's Will made Tenant for Life only, whereas by the Condition he was to have had a greater Eſtate; he conceived, that was well enough, and better anſwered Mr. *Rogers*'s Intent, than if the Condition had been literally performed; and declared, that if the Subſtance of the Condition in this Caſe was performed, it ſhould ſerve turn. But as to the Quantity of the Eſtate left the Plaintiff by his Father's Will, if that ſhould prove deficient in Value, it might make a new Caſe, and therefore ordered a Maſter to examine the Value of the E-

Sufficient if the Intent of a Condition be performed, tho' not the Words.

ſtate deviſed, and the Amount of the Debts, which that Eſtate was charged with, and to report to the Court, whether after Debts paid there would be Two full thirds of Sir *Francis Popham*'s Eſtate, which was ſettled upon him in Marriage, left to the Plaintiff; And alſo in the mean time to proceed to take the Defendants Accounts.

Caſe 74.
14 Novembris.
In Court Lord Chancellor.

Bovey verſus *Smith.*

Vid. ante Caſe 58. poſt Caſe 139.

THIS Day this Cauſe came again to be reheard; and the Matter inſiſted on by the Defendant's Council was not, that the Judgment was erroneouſly given at the former Hearing, but they endeavoured to vary the Caſe, Lord *Chancellor* declaring he did not ſee what they could object againſt the Decree at the former hearing, and that he was the more eſtabliſhed in his Opinion, having, ſince that Decree pronounced, diſcourſed with the *Lord Chief Juſtice North*, who concurred with him in Opinion. He told them it was *Littleton*'s Caſe, where a *diſſeiſor aliens*, and a diſcent is caſt, and afterwards the Diſſeiſor repurchaſes the Eſtate; in that Caſe the Diſſeiſee may re-enter. And ſo where a Man wrongfully poſſeſſes himſelf of my Goods and ſells them in a Market Overt, if he afterwards buys theſe Goods again, I may ſeize them in his Cuſtody. That in this Caſe the Fine had not deſtroyed the Truſt; for a Fine being but a Conveyance did not extinguiſh or ſeparate the Truſt from the Land, but transferred them both together.

Lit. S. 395. 1 Inſt. 242. a.

Fine levied by a Truſtee, and 5 Years paſt, does not deſtroy the Truſt nor ſeparate it from the Land, but transfers them both together.

But the Council for the Defendant would have it that the Intent of the Deviſor was to paſs a Fee to the Daughters, but the Will being in *Dutch*, they had not there the Word (*Heir*) in uſe amongſt them; but a Deviſe to Children and their Children according to their Cuſtoms paſſed a Fee: In this Caſe the Teſtatrix had deviſed the Writings belonging to the Eſtate, and in all other Parts of the Will where ſhe had deviſed the Writings, ſhe had paſſed

ſed a Fee, and inſiſted on the Words in the Will (*Houſes purchaſed with my Capital*) as, that theſe Words imported a Fee; and it was further inſiſted, that in this Caſe, the Plaintiff as Reverſioner came too ſoon, ſome of the Daughters Children being living, and to prove that, they had the living exhibits here in Court.

But it was anſwered, that the Words (*Purchaſed with my Capital*) ſignified nothing as to the Greatneſs of the Eſtate deviſed, but ſhe being a Feme Covert, and Trading as a Feme Sole, thoſe Words were only to expreſs, that ſhe had purchaſed thoſe Houſes with the Mony ſhe had got by her ſeparate Trade; And as to what was objected, that in *Dutch* they never uſe the Word *Heir*, that ſignifies nothing, for a Will that concerns Land in *England* muſt be ſo framed as by the Law of this Realm is required for the paſſing of Eſtates, as has been ſeveral times reſolved in Caſes of *Latin* Wills, and the like: And the Defendant's Council had anſwered their own Objection, by another Objection they made, that in other parts of the Will where ſhe had deviſed the Writings, ſhe had deviſed a Fee, whereby it appeared ſhe was not ignorant how to have deviſed a Fee (as they would have it ſhe was) if ſuch had been her Intent; and as to the Objection of the Grandchildren being living, it was ſaid that the Will as to them was idle and void, it being *to ſuch of her Daughters as ſhould be living at her Deceaſe, and to the Children of the Survivor of them.*

Wills in *Latin* or *Dutch* muſt be ſo fram'd as to paſs an Eſtate according to the Rule of our Law.

Then an Objection was ſtarted by the Court, *viz.* that the Teſtatrix having by Deed in her Life-time ſettled the Premiſes to ſuch Uſes as ſhe ſhould appoint, and in default thereof, to her five Daughters and their Heirs, therefore if a Fee does not paſs to them by the Will, but only an Eſtate for Life, yet the Reverſion paſſed by that Deed; for where a Man has a Power of appointing a Fee, he may execute it at ſeveral times, and appoint an Eſtate for Life at one time, and the Fee at another time.

A Power of appointing a Fee may be executed at ſeveral times, *viz.* at one time to paſs an Eſtate for Life, and the Fee at another.

In Anſwer whereunto it was ſaid, that ſhe having by her Will appointed an Eſtate for Life only to four of the five Daughters that were to take the Fee for default of Appointment, that ſhewed her Intent, that they ſhould not take a Fee, and was an implicit Appointment of the Fee to the Plaintiff her Heir. And it was agreed, that this Objection was of Weight, and therefore the Council prayed a Day to be heard to it, which was ordered accordingly.

Caſe 75.

17 Novembris. *In Court Lord Chancellor.*

Bill to be relieved againſt a Releaſe, as gained by Fraud; it appeared there had been another Releaſe given; and tho' it was ſaid, *that* was got in the ſame manner, yet not being taken notice of in the Bill, nor Relief prayed againſt it, Bill was diſmiſſed.

Gray & Ux' verſus *Bull.*

THE Bill in this Caſe was to be relieved againſt a Releaſe, ſetting forth that *Bull* the late Husband of the Defendant, being poſſeſſed of a great perſonal Eſtate, to the Value of 6000 *l.* and upwards, deviſed the ſame to be equally divided between the Defendant (his Widow) and his Daughter, now the Plaintiff's Wife; but that the Defendant concealing the Value of this Eſtate, got from her Daughter a Releaſe of all her Intereſt in the ſaid Eſtate for 350 *l.* alledging that her Part of the Eſtate came to no more; and therefore to have an Account, and be relieved againſt this Releaſe, was the Bill.

But it appearing, that the Plaintiff *Gray* was only a ſecond Husband to *Bull*'s Daughter, and that her former Husband had releaſed, it was objected that the Plaintiff in this Caſe could not be relieved; altho' it was inſiſted for the Plaintiff, that the ſecond Releaſe was grounded on the ſame bottom with the former, and was for the ſame Reaſon fraudulent, the Value of the Eſtate having been in both Caſes concealed; and that the Releaſe given by the Plaintiff's Wife's former Husband was upon little or no Conſideration: To which it was anſwered, that the ſecond Releaſe was upon very good Conſideration, for it was upon Receipt of the remaining part of the ſaid 350 *l.* and a Releaſe given on the compleating Payment is as Valid, and

upon

upon as good Consideration, as a Release given upon immediate Receipt of the whole: But in this Case, if the second Release was fraudulent or avoidable, yet it cannot be avoided by the Plaintiffs, for they have no Bill to be relieved against this second Release, the Plaintiff's Bill taking notice of nothing but the first Release; and thereupon the Bill was dismissed.

Izraell versus *Narbourne.*

Case 76.

17 Novembris.

At the Rolls. Master of the Rolls.

Bill to be relieved against a Bail-Bond assigned by the Sheriff by Fraud. Plaintiff in the Action at Law must be made a Party.

THE Bill was to be relieved against a Bail-Bond, setting forth, that the Defendant the Sheriff by a fraudulent Practice had been prevailed upon to return a *Cepi Corpus* a Year after the Defendant in the Action at Law was dead; and tho' he was not amerced for not having the Body at the Day, yet had by a Combination with the Plaintiff at Law assigned this Bond; and now a Suit was commenced at Law in the Defendant's Name: All which was fully made out by Proof; yet for as much as the Plaintiff in the Action at Law, to whom and for whose benefit the Bond was Assigned, was not made a Party, *the Master of the Rolls* refused to relieve the Plaintiff in this Case, and the rather for that he having made the Plaintiff at Law a Party to his Bill, had never served him to Answer; (tho' if he had not been named a Party, the Defendant the Sheriff might have demurred) but ordered the Plaintiff at Law to be brought to hearing, and continued the Injunction in the mean time.

Goddard versus *Keate.*

Case 77.

17 Novembris.

At the Rolls.

Lessee, where there is a Covenant by him to repair, makes an Under-Lease to *J. S.* who is in Possession.

THE Effect of the Bill was, that the Plaintiff, Lord of a Manor in the West, had, according to the Custom there, made a Lease to the Defendant's late Husband for 99 Years, if three lives lived so long, and in the Lease there was a Covenant that the Lessee should repair:

Under-Leſſee not liable to this Covenant in Law, nor bound by it in Equity, unleſs the firſt Leſſee is inſolvent.

pair: That the Defendant's late Husband had made a Leaſe for 10 Years to Truſtees in Truſt for his Wife the Defendant, if ſhe lived ſo long: That the Defendant was in Poſſeſſion, and the Premiſſes being much out of Repair, the Plaintiff had brought an Action at Law againſt the Defendant on the Covenant; but ſhe ſhewing that the Eſtate in Law was in Truſtees, the Plaintiff was forced to be non-ſuited, and therefore that ſhe receiving the Profits might be compelled in Equity to repair, was the Bill.

For the Plaintiff it was argued, that where a Man makes a Leaſe rendring Rent, if the Leſſee aſſigns to a Beggar or inſolvent Perſon, in Equity the Leſſee ſhall be bound to pay the Rent, which was a common Caſe, and in parity of Reaſon with this Caſe.

But for the Defendant it was inſiſted, that this was not any Aſſignment of the Term, but only a derivative Leaſe, and there was no Privity between the firſt Leſſor the Plaintiff, and the Defendant, and therefore ſhe ought not to be charged in Equity; but the Plaintiff had a proper Remedy at Law againſt the Executors of the firſt Leſſee, who were not made Parties, nor brought before the Court. If the firſt Leſſee had not left Aſſets, then indeed there might be ſome reaſon in Equity to charge the Defendant with this Covenant; but where the proper Remedy did not fail, the Plaintiff ſhall not be ſuffered to reſort to this extraordinary Remedy; and thereupon the Bill was diſmiſſed.

Caſe 78.

15 Novembris.

Fouke verſus *Lewen.*

In Court Lord Chancellor.

A Man marries an Orphan, who dies under 21. Her Orphanage part ſhall not ſurvive to the other Children, but ſhall go to the Husband.

THE Bill was to have an Account of a Citizen's perſonal Eſtate, and to be let into the Orphanage part, the Plaintiff having married a Citizen's Daughter. And the chief Point of the Caſe was, whether the other Children of *Lewen* the Citizen were ſo advanced by him in his Life-time, as to exclude them of their Orphanage part.

Per

Per Curiam any Proviſion made by the Father in his Life-time for his Children is an Advancement within the Cuſtom, unleſs it be declared by writing that they are not ſufficiently advanced; and for ſome time it was held that in ſuch Writing there muſt be Mention made what Sum they received from their Father, becauſe of bringing it in *Hotch-pott*. *Vid. post. Case 213.*

But it was inſiſted that the Plaintiff's Wife being dead, and ſhe dying before the Age of *Twenty one*, her Husband not having received her Share of the Orphanage part, her Share by the Cuſtom did ſurvive, and prayed that the *Recorder* might certify the Cuſtom in this Particular; and to prove the Cuſtom they cited *Pheaſant*'s Caſe. 1 Ch. Rep. 181. 2

But the Court rejected this matter; for altho' if an Orphan dies before *Twenty one* Years of Age unmarried, there may be ſuch Cuſtom, yet that Cuſtom cannot take Place, where the Orphan is married, and the Intereſt of her Share veſted in her Husband; and if there was any ſuch Cuſtom, it would be unreaſonable and void: And *Pheaſant*'s Caſe is nothing to the Purpoſe; For there the Husband dying, and his Wife's Orphanage Share remaining in the Chamber of *London*, the Queſtion was, whether it was *Debitum* or *Depoſitum*, and whether the Widow ſhould have it, or the Executors of the Husband.

Then they inſiſted on a Clauſe in *Lewin*'s Will, recommending his Children (whom the Plaintiff would have to be fully advanced) to the Care of his Wife, to provide further for them; and that that amounted to a ſufficient Declaration, that he thought them not fully advanced: But is was anſwered, that ſuch an Implicit Declaration would not ſerve turn; and beſides that Clauſe had another Meaning, and did work upon the Legatory Part only.

2. Whether any Proviſion made by the Father for his Child be an Advancement, or whether only ſuch a Proviſion

Whether any Proviſion made by a Freeman for a Child, unleſs upon Mar-

riage, or in purſuance of a Marriage Agreement, be an Advancement.

viſion as is made on the Marriage of the Child. It ſeems to be only ſuch a Proviſion as is made on Marriage, or in purſuance of a Marriage Agreement.

Caſe 79.

18 Novembris. *In Court Maſter of the Rolls.*

Savage verſus *Smalebroke.*

Defendant demurred, for that the Plaintiff had made no Title by his Bill, and alſo anſwered ſeveral parts of the Bill. Demurrer over-ruled by the Anſwer.

THE Defendant having demurred, for that the Plaintiff had made no Title to himſelf in the Bill, (as in truth he had not) Mr. *Hutchins* inſiſted, that the Plaintiff had over-ruled his own Demurrer, by having anſwered over to ſeveral Parts of the Bill. But the Matter of fact being denied, and there being no Books in Court, the Matter was adjourned.

Caſe 80.

20 Novembris. *In Court Lord Chancellor.*

Noel verſus *Robinſon.*

UPON a Rehearing the Caſe was thus. Sir *Martin Noel*, Father of the Plaintiffs, being poſſeſſed of a great Perſonal Eſtate, and of a Moiety of a Plantation beyond Sea, made his Will, 23 *Sept.* 1665. and the Defendant *Robinſon* and two others Executors thereof, and deviſed his ſaid Moiety of the Plantation and of the *Negroes* and Stock thereto belonging to the Plaintiffs, *Nathaniel*, *Grace*, and *Elizabeth*, his Children, then Infants, and directed the Executors to receive the Profits, and to give an Account, and pay the Proceed thereof for the Maintenance and Education of the Plaintiffs.

The Defendant *Robinſon* only proved the Will and took on him the Management of the Teſtator's Moiety of the Plantation, and afterwards made a Leaſe thereof to one *Worſam* for a term of Years, and reſerved the Rent to himſelf in truſt for the Plaintiffs Uſe.

The Plaintiffs brought their Bill againſt *Robinſon* the Executor and one *Faulconer*, who had purchaſed of the Executor the ſaid Moiety of the Plantation for a valuable

ble Conſideration, that they might account for the Profits of the Plantation and pay the ſame to the Plaintiffs, that they might convey to the Plaintiffs the ſaid Moiety of the Plantation, and that they might hold and enjoy the ſame according to the Will; they inſiſting, that the Defendant *Robinſon* by making the ſaid Leaſe had aſſented to the Deviſe of the Moiety of the Plantation to the Plaintiffs.

The Defendant *Robinſon* by Anſwer admitted the Will, and his making the ſaid Leaſe and reſerving the Rent in manner aforeſaid; but ſaid, he made the ſame in ſuch manner without due Conſideration, and not with Intent thereby to aſſent to the Deviſe to the Plaintiffs, and thereby deprive the Creditors of their juſt Debts, and exempt the Eſtate therefrom; and that the Eſtate fell ſhort of paying the Teſtator's Debts, and he had therefore been forced to ſell the Teſtator's Moiety of the Plantation to the Defendant *Faulconer* for 500 *l.* which he had applied in Payment of the Debts. And the Defendant *Faulconer* inſiſted on his Purchaſe.

For the Defendant *Robinſon* it was inſiſted, that he was now before the Court in three Capacities, *viz.* as an Executor, as a Truſtee, and as a Creditor to Sir *Martin Noell*'s Eſtate. And *Firſt*, that this Leaſe at moſt was but an Implicit Aſſent; and it might be taken to be done two ways, either as a Truſtee or as Executor; and in this Caſe it ought to be taken as done *Quatenus* a Truſtee; becauſe that way it could work no Wrong to any one. But it was inſiſted, that in truth there was no Aſſent, for that depends upon the Intent of the Party, and it appears he did not intend to aſſent to the Legacy; for when a Leaſe is ſpecifically deviſed, if the Executor aſſent, there is no longer any Intereſt in the Eſtate left in the Executor; and it appears, that in this Caſe the Executor apprehended an Eſtate ſtill remaining in himſelf, as appears by his ſelling this Plantation, and by other his ſubſequent

Acts

Acts concerning the ſame. And it was likewiſe inſiſted, that tho' in Law this Leaſe might amount to an Aſſent, yet in Equity it ſhould not; and cited ſeveral Caſes, in which this Court had mitigated the Rigour of the Law in relation to Executors, and particularly in the Matter of refunding Legacies, *viz.* the Caſe of *Biſcoe* and *Nelthrope*, and the Caſe of *Grove* and *Benſon*; and that in this Caſe the Defendant had done no more than what in Equity he might have been compelled to have done, and his doing of it without the Trouble of a Suit ought not to be turned to his Prejudice.

Then it was inſiſted that in this Caſe the Defendant the Executor is to be conſidered as a Creditor to Sir *Martin Noell*'s Eſtate; for being an Executor, and in diſburſe for Debts by him paid, which were owing by the Teſtator, he is now become a Creditor for ſo much to the Teſtator's Eſtate; And that a Creditor ſhall be relieved againſt a Legatee, that has received his Legacy, was ſettled in the Caſe of *Chamberlayn* and *Chamberlayn*. If an Executor aſſign a Term without Conſideration, and Aſſetts fail, the Creditors ſhall follow this Eſtate, into whoſe Hands ſoever it comes. And in this Caſe an Executor who had carried himſelf fairly, and without exception, and it may be, if he had come to any one here to adviſe with, he could not have been directed how to have managed himſelf more prudently, it not appearing, nor was it in the leaſt ſuſpected when he made the Leaſe of the Plantation, but that the Aſſetts would have anſwered all Debts with a great Overplus, which afterwards became deficient by the breaking of two eminent *Spaniſh* Merchants, that dealt in *Negroes*, and broke for the Value of 200000 *l.* and were then Debtors to Sir *Martin Noell*'s Eſtate to the Value of 30000 *l.* and therefore in a Caſe of ſuch extremity the Executor ought to be relieved againſt the Rigour of the Law; and they cited the Caſe of *Hult* the Goldſmith, who being an Executor had given a Recognizance for payment of a Legacy, and afterwards

wards the Aſſets becoming deficient to pay the Debts by the Fire of *London*, he was relieved againſt this Recogniſance. And where a Fine is ordered to be levied by the Decree of this Court; if it be ſo done, as to paſs a greater Eſtate, or to operate further in Law than this Court intended, there, tho' a Fine be the moſt ſacred Conveyance at Law, this Court will reſtrain it to what was the original Intention of levying it.

For the Plaintiffs it was argued by their Council; and *firſt*, as to the Objection that this Plantation was a Fee ſimple Eſtate, but by the Cuſtom of the Country made a Teſtamentary and Perſonal Eſtate in relation to Debts only, but was not a Perſonal Eſtate in any other reſpect, and therefore in this Caſe the Executor had no Power to aſſent, as he may, where a Term is ſpecifically deviſed; it was anſwered, that an Executor may diſpoſe of a Term or of a Fee ſimple Eſtate, that he has in Truſt for Payment of Debts, and that this Aſſent amounted to a Diſpoſition.

As to the Objection, that the Defendant *Robinſon* in this Caſe is a Creditor, *that* we deny; for where an Executor pays a Legacy that he ſhould not have done, that ſhall not make him a Creditor to his Teſtator's Eſtate: And as to the Caſe of *Hodges* and *Dunkim*, it was not there reſolved, that an Executor ſhould be relieved upon the voluntary Payment of a Legacy. As to the Objection, that where a thing may be taken two ways, it ſhall not be conſtrued to do a Wrong, they may do well to remember another Maxim of the Law, that *a Man's own Deed ſhall be taken ſtrongeſt againſt himſelf.*

Lord *Chancellor*. There is a difference between a Suit for a Legacy in this Court, and a Suit for a Legacy in the Spiritual Court. If in the Spiritual Court they would compel an Executor to pay a Legacy without Security to refund, there ſhall go a Prohibition, as was reſolved in the

If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition ſhall go.

Caſe of *Knight* and *Clarke*: But in this Court, tho' there be no Proviſion made for refunding, yet the common Juſtice of this Court will compel a Legatee to refund. It is certain that a Creditor ſhall compel the Legatee to refund, and ſo ſhall one Legatee compel the other, where the Aſſets become deficient: But whether the Executor himſelf, after he has once voluntarily aſſented unto a Legacy, ſhall compel the Legatee to refund, is *Cauſa primæ Impreſſionis:* And it muſt be allowed that there is a great difference between a voluntary Aſſent, and where the Executor was compelled to aſſent. We know the common Caſe, if a Man voluntarily pays Mony to a Bankrupt, after he becomes a Bankrupt, it is in his own wrong, and he may be forced to pay it again; but otherwiſe it is, if the Bankrupt recover it againſt him by courſe of Law: And a ſmall matter ſhall amount unto an Aſſent to a Legacy; an Aſſent being but a rightful Act. Whereupon the Lord *Chancellor* confirmed his former Decree, and the Plaintiff's Bill was diſmiſſed.

A Creditor ſhall compel a Legatee to refund, and ſo ſhall one Legatee another, where Aſſets are deficient.

An Executor, after he has voluntarily aſſented to a Legacy, ſhall not compel the Legatee to refund.

A Debt voluntarily paid to a Bankrupt ſhall be paid over again. Otherwiſe, if recovered by courſe of Law.

A ſmall matter will amount to an Aſſent to a Legacy.

Note, This Cauſe was three times heard before the Lord *Chancellor Nottingham*, and a Decree pronounced by him for the Plaintiff, and twice confirmed. And on 25 *Junij*, 3 *Jac.* 2. this Cauſe was reheard by the Lord *Chancellor Jefferies*, who reverſed the Lord *Keeper North's* Decree, and affirmed the Decree made by the Lord *Chancellor Nottingham.*

In the arguing of this Caſe, was cited the Caſe of *Davie* and *Drew* alias *Drewry*, in which it was reſolved in the *King's Bench*, and afterwards in this Court, that where an Executor makes a Leaſe rendring Rent, his Adminiſtrator ſhall have it, and not the Adminiſtrator *de bonis non.*

An Executor makes a Leaſe rendring Rent, his Adminiſtrator ſhall have the Rent, and not the Adminiſtrator *de bonis non.*

Wagſtaffe

Case 81.
20 Novembris.
In Court Lord Chancellor.
Bill for an Account of Mony received for one who became a Bankrupt.
Defendant Pleaded he received the Mony as a Menial Servant to the Bankrupt and had accounted for it to him.
Plea over-ruled.
Vid. post Case 127 & 204.

Wagſtaffe verſus *Bedford.*

THE Bill being to have a Diſcovery and Account of Mony received by the Defendant, on the behalf of one who became a Bankrupt, the Defendant Pleaded he received it only as a Menial Servant to the Bankrupt, and had accompted for it to him already, and that the Commiſſioners had already Examined him on Interrogatories. The Plea over-ruled.

Case 82.
20 Novembris.
In Court Lord Chancellor.
No good Cauſe of Demurrer that an Executor is not a Party, when Plaintiff alledges in his Bill, he knows not who is Executor, and prays Defendant may diſcover him.

Bowyer verſus *Covert.*

THE Defendant had Demurred for want of proper Parties, one of the Executors not being made a Party; and the Demurrer was over-ruled, becauſe the Plaintiff had alledged in his Bill, that he knew not who was the other Executor, and pray'd that the Defendant might diſcover, who he was, and where he lived.

Case 83.
21 Novembris.
In Court Lord Chancellor.
2 Ch. Rep. 127.
Deviſe of 400 *l.* to be laid out in finiſhing an Houſe.
Teſtator lives to lay out as much himſelf, but leaves the Houſe unfiniſhed.
The 400 *l.* ſhall not be laid out.

Husbands verſus *Husbands.*

THE Caſe appeared to be thus. A Man intending to build a Seat upon his Eſtate, and having laid the Foundation of it, made his Will (which in time was a little after the making of the Act of *Frauds* and *Perjuries*) and by his Will Deviſed Land for raiſing Portions for his younger Children, and paying of his Debts; and appointed that 400 *l.* ſhould be laid out in Perfecting the building of his Houſe.

It happened, that he lived ſeveral Years after the making of this Will, and in that time expended upon his Houſe above 400 *l.* altho' he left the ſame unfiniſhed, and died, leaving ſuch Will as aforeſaid: but the ſame was defective,

as to the paſſing of the Lands intended to be paſſed thereby, for not being Subſcribed by Witneſſes according to the ſaid Act of Parliament.

It was now inſiſted by the Council for the younger Children, that the Heir at Law ought to have no benefit of the 400 *l.* by the Will appointed to be laid out on this Houſe. *Firſt*, Becauſe the Teſtator himſelf, after the making of this Will, had expended above that Sum on the Houſe; and inſtanced in ſome Caſes of the like nature, where it had been ſo Decreed. *Secondly*, The Teſtator's Intent appearing and plainly Expreſſed in his Will, was, to have Charged his Land with ſeveral Sums of Mony; but that Intent being fruſtrated by the Act of *Frauds* and *Perjuries*, the Heir had a greater Benefit thereby, than if the Deviſe had ſtood good, and the 400 *l.* was to be laid out on the Houſe, for his Eſtate is now eaſed of 1000 *l.* that would have lain upon it, if the Will had been good in form; and therefore it would now be very hard for a Court of Equity to charge the Teſtator's Perſonal Eſtate with this 400 *l.* whereby the Proviſion intended the younger Children (which was already, by their Father's not obſerving of the Act of *Frauds* in making of his Will, very much abridged) wou'd in a manner be wholly defeated.

Whether perſonal Eſtate ſhall be leſſened in prejudice of younger Children to make good a Direction in the Father's Will for the Benefit of the Eldeſt Son, when he at the ſame time takes advantage of a defective Execution of the Will, and defeats the Father's Intention in favour of his younger Children.

As to the *Firſt* Objection, it was Anſwered, that the Teſtator had a little before his Death, and after he had expended ſuch Mony as they on the other ſide mention to be 400 *l.* declared his Intent to be, that whether he lived or died, that Work ſhould be perfected; and his uſual Saying was, that his Houſe ſhould never be called *Mockbeggars* Hall.

As to the *Second* Objection, they conceived the 400 *l.* ought not to be taken away upon that Pretence, unleſs the ſame had been expreſly charged upon the Land, which in this Caſe it was not.

But

But the Lord *Chancellor* Decreed againſt the Heir at Law, who was Plaintiff here in Equity to have the benefit of this 400 *l.* upon the *Firſt* Objection; And ſo there was no Opinion Declared as to the Second Point, tho' the Court ſeemed to incline againſt the Plaintiff in that alſo.

Perkins & al' verſus *Walker & al'.*

Caſe 84.

21 Novembris. *In Court Lord Chancellor.*

A Mortgage after a Voluntary Settlement with Power of Revocation, and a Will in Confirmation of it, is a Revocation *pro tanto* only.

ONE *John Walker* having by a Voluntary Settlement made himſelf Tenant for Life, with a Power to leaſe or grant for a Thouſand Years at any Rent, he by Deed grants the whole Term to Truſtees, in Truſt that he himſelf ſhould enjoy the ſame during his Life, and afterwards in Truſt, by Sale or otherwiſe to raiſe out of the Premiſes ſeveral Sums of Mony for Payment of his Debts, and to diſcharge a Mortgage of 200 *l.* and other Sums, which he appointed to the Plaintiffs, his Nephews and Neices; which Deed was with a Power of Revocation.

After this, the ſaid *John Walker* having Occaſion for Mony, he Mortgages this Eſtate three ſeveral times to Sir *William Humble*, having before that made his Will and Confirmed his ſaid firſt Deed, and thereby appointed other Legacies to be paid by his Truſtees.

The Point inſiſted on was, that by theſe Subſequent Mortgages to *Humble*, the ſaid *Walker* had revoked his Will, and the former Deed, that was made with a Power of Revocation. *Sed non allocatur*; It might be a Revocation *pro tanto*, but no otherwiſe.

A Man deviſes Land in Fee, and then makes a Leaſe for Years of the ſame Land. The Leaſe, if not made to the Deviſee, is a Revocation at Law *pro tanto* only. *Vid. poſt Caſe* 133.

And the Lord *Chancellor* cited the Caſe of *Coke* and *Bullock*, 2 *Crook* 49. That a Man having by Will deviſed a Fee Simple, afterwards by Indenture makes a Leaſe for Years of the ſame Lands; this Leaſe, if not made to the ſame Perſon, ſhall be a Revocation *pro tanto* only, even at Law: and the Principal Caſe is much ſtronger in Equity, which will charge and ſubject an Equity of Redemption.

Case 85.

21 Novembris.

In Court Lord Chancellor.

An Officer in the Army agrees to surrender his Commission to *I. S.* in consideration of 100*l.* for which Bond is given.

The Officer surrenders, but *I. S.* is refused the Commission.

No Relief against this Bond.

Berrisford versus *Done.*

DONE (the Defendant's Son) being a Captain of a Company in *Ireland*, and growing sickly, and not likely to live long; and the Plaintiff being Lieutenant of the same Company, treated with him to surrender his Command, that so he might be advanced in his Place; and at last they agreed that in Consideration of 100*l.* he should surrender it, and a Bond was given for the 100*l.*

The Bill was against the Executrix of the Obligee, to be relieved against this Bond: And upon the Plaintiff's Proofs in the Cause, the Case appeared to be thus, *viz.* That *Done* did surrender, but that the *Duke* of *Ormond* did refuse to accept of the Surrender, and would not admit the Plaintiff thereon, alledging that *Done* had freely received the Place from the Duke, and therefore now *Done* was grown weary of it, and had kept it as long as he thought fit, the Duke would not suffer him to sell it: And the *Duke* of *Ormond* and his Secretary being examined for the Plaintiff in this Cause deposed to that Effect.

The Plaintiff's Council insisted on the Disadvantages that would attend the countenancing of such Bargains, and the Discouragement it would be to Gentlemen, that they should not by their continued Service raise themselves to Preferment; but must either buy the same, or suffer others to jump over their heads, let them have never so well merited Preferment.

But for the Defendant it was insisted, that the Agreement was not to sell an Office, but only to do a lawful Act, which was to surrender the Commission; and this was literally performed; and the said *Done* did not under-

undertake the Plaintiff ſhould be admitted upon ſuch Surrender; but the Plaintiff was to look to that himſelf; and if he has not profited by this Surrender, it was his own Fault: And in truth he, finding *Done* a dying Man, forbore to get himſelf admitted in *Done*'s Life-time, that he might have this pretence to avoid his Bond; and *that* now is the Thing that grieves the Plaintiff, and occaſions this vexatious Suit. That the Plaintiff was over-haſty to purchaſe the Commiſſion, which, if he had had a little more Patience, he might have obtained at an eaſier Rate; But his own improvident Bargain can create no Equity to himſelf. And Mr. *Hutchins* cited a Caſe in point, that had been decreed but the laſt Term; Where a Man contracted with an Officer to ſurrender his Place for 100 *l.* and gave Bond for it; and afterwards the Officer ſurrenders accordingly; But the Obligor being not judged fit for the Imploy by his Superiors, could not procure himſelf to be admitted, and thereupon came into *Chancery* to be relieved againſt his Bond entred into for Payment of this 100 *l.* but was diſmiſſed.

A. agrees to ſurrender his Office to B. for 100 *l.* for which B. gives Bond.
A. ſurrenders, but B. not being qualified is refuſed to be admitted.
No relief for B.

In the Principal Caſe the Lord *Chancellor* decreed for the Defendant; but ordered her to accept of her Principal Mony, without either Intereſt or Coſts.

Turner verſus *Gwynn.*

Caſe 86.
21 Novembris.
In Court Lord Chancellor.

THE Caſe was to this effect. A Man having a long Term for Years ſettled to attend the Inheritance, which was entailed, he, by a Fine and Deed to lead the Uſes thereon, ſubjected this Term for the Payment of 1000 *l.* but declared, that after that Sum was paid the Land ſhould be to the ſame Uſes as before.

One ſeized in Tail, and a Term in Truſtees to attend the Inheritance, levies a Fine, and by Deed ſubjects the Land to a Debt of 1000 *l.* but declares, that, after the Debt paid, the Land to be to the old uſes, and after deviſes the Land for payment of all his Debts.

The Bill was to ſubject this Term to the Payment of other Debts.

Decreed the Land liable to all the Debts in General. *Sed Q.*

For the Defendant it was inſiſted, that a Term, which is limited to attend the Inheritance, is not Aſſetts, either in Law or Equity; and when it is ſubjected for a particular Purpoſe only, it ſhall not be ſtrained nor extended further.

But for the Plaintiff it was anſwered, that tho' a Term limited to attend the Inheritance was not in it ſelf in any ſort Aſſetts either in Law or Equity; yet a Man, that has ſuch a Term in him, may ſubject it to the Payment of Debts, if he pleaſes; and *Gwynn* in this Caſe has actually done it, he having by his Will deviſed all his Lands in the County of *B.* where theſe Lands lie, for the Payment of his Debts.

To this it was anſwered, that thoſe Words in the Will might be otherwiſe ſatisfied, for that he had Fee Simple Lands in that County, and the Deviſe ſhould be intended of them only; but that not appearing in the Cauſe, it was decreed for the Plaintiff, and the Land ſubjected to the Payment of the Teſtator's Debts in General. *Sed tamen Quære.* For it ſeems, he was but Tenant in Tail of the Inheritance, and ſo could not charge it by his Will, unleſs it be intended he had ſtill a Power of doing it lodged in him by reaſon of the Fine, notwithſtanding he had declared, that after Payment of the 1000 *l.* it ſhould go to the former Uſes.

Caſe 87.
22 Novembris.
In Court Lord Chancellor.

Villers verſus *Beaumont & al'.*

Voluntary Settlement without power of Revocation ſhall bind the Party, and ſhall not be defeated by a ſubſequent Will.

THE Caſe upon the Pleadings appeared to be thus, *viz.* The Lady *Anne Beaumont* took a Leaſe from an Hoſpital in *Leiceſter* for three Lives in Truſtees Names, in Truſt for her and her Heirs. She dies, and this Leaſe comes to one *William Beaumont*, who a little before his Death, by a little ſcrap of Paper at an Ale-houſe, but under Hand and Seal, ſettles this Term (in which he had then only a Truſt) upon the Plaintiffs his Couſins, to the Intent to pay his Debts, and gave the Surplus to them.

After

After this, he being diſſatisfied with this Settlement, which he had delivered out of his Hands to a Creditor, makes his Will in Writing, and thereby deviſes this Term, ſubject alſo to the Payment of his Debts, to his half Brother the Defendant the Lord *Beaumont*, in whoſe Family this Leaſe had for a long time been: And the Queſtion was, whether the Deed or Will ſhould prevail.

On behalf of the Defendant it was inſiſted, that the manner of obtaining this Deed carried with it Badges of Fraud and Circumvention, or of a Surprize at leaſt; Mr. *Beaumont* declaring as much, preſently after the executing of it: And it was further inſiſted, that a Man had a Power over ſuch a voluntary Settlement, for which was cited the Lord *Ormond*'s Caſe, as an Authority in Point.

But it was anſwered, that all latter Reſolutions had been contrary to the Opinion in that Caſe, and inſtanced particularly in the Caſe of *Crump* and *Bowater*, and the latter Caſe of *Curtis* and *Hatcher*, concerning Mrs. *Leviſton*'s Eſtate; where it was reſolved, that a ſecond Deed ſhould not prevail againſt the former; much leſs a Will.

Lord *Chancellor*. There is no colour in this Caſe: If a Man will improvidently Bind himſelf up by a voluntary Deed, and not reſerve a Liberty to himſelf by a Power of Revocation, this Court will not looſe the Fetters he hath put upon himſelf, but he muſt lie down under his own Folly: For if you would relieve in ſuch a Caſe, you muſt conſequently eſtabliſh this Propoſition, *viz. That a Man can make no voluntary diſpoſition of his Eſtate, but by his Will only, which would be abſurd.*

Child verſus *Stephens.*

Caſe 88.

23 Novembris.

In Court Lord Chancellor.

A Man indebted by ſeveral Mortgages, Judgments, Bonds, and ſim-

THIS Caſe came before the Lord *Chancellor*, upon a Point reported ſpecially by the *Maſter* for his Lordſhip's Judgment, and was in ſhort no more than this.

ple Contract, ſettles his Eſtate for Payment of his Debts. The real Securities ſhall be firſt paid, and then the Bonds and ſimple Contract Debts in an Average.

Upon Mr. *Child*'s Eſtate there were many Mortgages, Judgments and Statutes, and he likewiſe owed ſeveral Debts upon Bond and ſimple Contract, and had both by Deed in his Life-time and by Will conveyed and ſettled all his Lands upon Truſtees for Payment of his Debts: Now ſome Parts of his Eſtate he had mortgaged no leſs than thrice over; each time for near the full Value.

It was now inſiſted, that theſe ſubſequent Mortgages were not Incumbrances on the Land; for all the Eſtate in Law was in the firſt Mortgagee, and ſo the ſubſequent Mortgagees had only an Equity; and likewiſe the Judgments, they would not immediately affect the Land then in Mortgage: And it comes within the common Caſe, where a Man ſettles by Deed, or deviſes by Will, Lands for Payment of his Debts; there all Creditors ſhall be paid alike in proportion; whether they are Creditors by Bonds or on ſimple Contract, unleſs their Security do affect the very Land ſo ſetled or deviſed for Payment of Debts; and therefore the ſubſequent Judgments and Mortgages ought only to be paid in proportion with the Bond Creditors and Debts upon ſimple Contract, which the Lord *Chancellor* at firſt conceived ought to be ſo done; and asked what could be ſaid againſt it.

Whereupon it was inſiſted, that the Mortgagees had a Security for their Mony, which a Court of Equity would never take from them, and being ſo, there could be no Sale made of this Eſtate without their Conſent; and ſo all the Debts would remain unſatisfied: For they that had the ſubſequent Securities, had ſtill, in Preſervation of their own Intereſt, a Right to redeem: And to ſet this Eſtate in a courſe of Redemption, would make pretty Work in this Caſe, where there were more than thirty Mortgages. For Example, *A* is a ſubſequent Mortgage; *B* has a prior Mortgage of a Moiety of the Lands contained in *A*'s Mortgage, and alſo of ſeveral other Lands. *C* has a prior Mortgage of the other Moiety of the Lands compriſed in

A's

A's Mortgage, and alſo of ſeveral other Lands: Now has *A* a plain Right to redeem all the Lands contained in both the Mortgages of *B* and *C*; and ſo it may be carried on through the Alphabet.

And after long Debate, the Lord *Chancellor* ordered, that the Real Securities ſhould be firſt ſatisfied, and then the Debts by Bond and ſimple Contract to be paid in Average; for that any other Method in this Caſe would become impracticable.

Afterwards at another Day, *viz.* 5th of *December*, being the firſt Seal, a Motion was made in this Caſe on behalf of one *Penruddocke*, (who had a Judgment on this Eſtate) that he might be let into a Satisfaction of his Judgment, before the ſecond Mortgagees, he being at Law intitled to that Preference, and therefore ought not to be deprived of it in Equity.

The Lord *Chancellor* declared, he thought the Motion reaſonable; till upon repeating the Reaſons above mentioned he was ſatisfied, it was not to be done in this Caſe: If legal Preference ſhould be preciſely obſerved, it would end in Confuſion; and ſo made no Order upon the Motion; all the other Creditors having conſented to the former Order; but left *Penruddocke* to get his Satisfaction, as he could by Law.

Anonimus.

Caſe 89.

23 Novembris. *In Court. Lord Chancellor.*

Plaintiff is not bound to make his Election, till Defendant has anſwered.

UPON a Motion, an Order for a Man to make his Election, whether he would proceed here, or at Law, was diſcharged, as being irregular; for that it was obtained before the Defendant had anſwered.

Anonimus.

Caſe 90.

13 Novembris. *In Court Lord Chancellor.*

Anonimus.

Where Land is deviſed to pay Debts and Legacies out of Rents and Profits, the Land may be ſold. Otherwiſe, if out of Annual Rents and Profits. But if ſuch Truſt is by Deed, the Land can't be ſold in either Caſe.

WHERE a Man deviſes Lands for Payment of Debts and Legacies out of the Rents and Profits of the ſame; there the Truſtees, it being in the Caſe of a Will, may ſell the Lands: But if it be to pay Debts and Legacies out of the annual Rents and Profits; there, tho' it is in Caſe of a Will, the Lands ſhall not be ſold: But ſuch Words in a Deed executed in a Man's Life-time ſhall, in neither Caſe, impower the Truſtees to ſell.

Caſe 91.

Anonimus.

IF the Defendant is in Contempt for not anſwering, and on Motion he obtains time to anſwer; if it be not expreſsly ordered, that all Contempts in the mean time ſhall be ſtaid, the Plaintiff may go on and proſecute the Defendant for not anſwering.

Caſe 92.

27 Novembris. *In Court Lord Chancellor.*

Dowſe verſus *Derivall.*

A Freeman of *London*, having a Term in his own Name, purchaſes the Inheritance in the name of a Truſtee, and there is no Declaration of Truſt, that the Term ſhall attend the Inheritance.

A Citizen and Freeman of *London*, poſſeſſed of a Leaſe worth 1500 *l.* bought the Reverſion and Inheritance thereof in the name of Truſtees for 150 *l.* and died. And whether this Leaſe being Aſſetts in Law ſhall be part of his Perſonal Eſtate, ſubject to the Cuſtom of *London* (there being no Declaration that it ſhould attend the Inheritance) was the Queſtion.

This Term ſhall attend the Inheritance, and not be ſubject to the Cuſtom.

And it was decreed, that tho' this Leaſe would be Aſſetts in Law to pay Debts; yet it ſhould attend the Inheritance, tho' there was no Declaration of Truſt that it ſhould do ſo, and not be liable to the Cuſtom.

Vid. ante Tiffin and *Tiffin, Caſe* 1.

This Cauſe was reheard before the Lord *Keeper North* in *Feb.* 1683. and he confirmed the Decree. 2 Ch. Rep. *Rich* verſus *Rich.* Fol. 160.

Anonimus.

Caſe 93.

WHERE a Man is put to his Election, whether to proceed at Law or in this Court, if the Bill be for the Land and to have an Account of the meſne Profits, he may Elect to proceed in an Ejectment at Law for the Poſſeſſion, and in Equity upon the Account; becauſe at Law he can recover Damages for meſne Profits, from the time only of the Entry laid in the Declaration.

Special Election to proceed at Law in an Ejectment for the Land, and in Equity for an Account of Profits.

Sackvill verſus *Aylesworth.*

Caſe 94.
15 Decembris.
At the Lord Chancellor's Houſe: Coram Juſtice Charleton.

ONE *Aylesworth* having formerly made a Will, and thereby deviſed great Part of his Eſtate to the Plaintiff *Sackvill*, and *Aylesworth* the Teſtator being ſince that time become a Lunatick, the Plaintiff exhibited his Bill againſt the Defendant (who was Preſumptive Heir at Law to the Lunatick) to examine Witneſſes touching this Will *in Perpetuam rei memoriam*: And the Defendant Demurred, becauſe it was a Bill to prove a Man's Will in his Life-time; and for that the Plaintiff had no Right or Title by the Will until the Teſtator's Death: a Will being until that time ambulatory, and in truth is no Will till the Teſtator's Death.

A Bill will not lie to perpetuate the Teſtimony of Witneſſes to a Lunatick's Will, in his Life-time, made before his Lunacy.

For the Plaintiff it was inſiſted, that to examine Witneſſes *in Perpetuam rei memoriam* is a chief part of the Original Juriſdiction of this Court, it being in all Caſes a natural Equity to have Teſtimony preſerved; and that in this Caſe it would be no Prejudice to any one; for if the Lunatick ſhould recover his Underſtanding, the Will, notwithſtanding this Examination, would be revocable: and it might be a manifeſt Prejudice to the Plaintiff to deny him

the Benefit of this Examination; for this Lunatick may ſtill live many Years, and continuing a Lunatick he is uncapable of making another Will, or of new Publiſhing this; and in that time all the Witneſſes to the Will, that could prove the Teſtator to be then *compos mentis*, might be dead. And they compared it to the Caſe formerly at common Law, where a Man became profeſſed, there his Will ſhould be proved, and yet he was not Abſolutely dead in Law; for he might be afterwards *Deraigned.* (but Q. whether the Will could be proved till after the Year and day, after which time he could not be *Deraigned.*) But Mr. *Juſtice Charleton* doubted, whether a Lunatick could have any Will, but that his Lunacy was a Revocation of all Wills made by him, whilſt *compos mentis.* (*Mes ſauns doubt Lunacie n'eſt aſcun Revocation*) And an Exception was taken to the Bill, that the Lunatick ought to have been made a Party, and to have had a Committee aſſigned him, to have defended the Suit: but it was anſwered, It is true, where a Lunatick is ſued, he muſt have a Committee aſſigned him to defend the Suit; But in this Caſe there was nothing Pray'd againſt the Lunatick, and ſo no need of that. But the Bill was diſmiſſed.

Caſe 95.
15 Decembris.
At the Lord Chancellor's Houſe: Coram Juſtice Charleton.

Wright verſus *Blicke.*

Bill by an Adminiſtrator for diſcovery of the Perſonal Eſtate.

It is no bar to the diſcovery, that the Adminiſtration is litigated.

A Man by Will deviſed ſeveral Legacies, and made the Defendant ſole Executor; who having the Right of Adminiſtration, to avoid the Legacies, refuſes to prove the Will, and had indeed ſworn that the pretended Inteſtate had made no Will, (for otherwiſe the Spiritual Court would not have granted Adminiſtration) and thereupon obtains Adminiſtration, and exhibits a Bill to have a Diſcovery of the Perſonal Eſtate.

To this Bill the Defendant pleaded, that the ſuppoſed Inteſtate had made a Will, and produced it in Court, and that the Plaintiff was privy to the making of it, and that there

there was now a Suit depending in the Spiritual Court, to revoke the Adminiſtration, and the Plaintiff was cited to prove the Will.

But the Plea was over-ruled, as containing no Equity, why the Defendant ſhould not anſwer as to the Diſcovery of the Teſtator's Eſtate.

Page verſus *Neale.*

Caſe 96.

Eodem die. *Coram Juſtice Charleton.* Demurrer to ſcandalous Matter ſuggeſted in a Bill.

THE Bill being to be relieved againſt a Bond of the Teſtator's, ſuggeſting that it was entred into without any Conſideration, it being only for that the Teſtator had unlawfully kept Company with the Defendant, and had a Baſtard by her:

To that part of the Bill the Defendant demurred, as being a matter ſcandalous, and that it ought not to be anſwered unto.

It was inſiſted for the Plaintiff, that a Demurrer was not the proper way to be relieved for Scandal, but that it was proper to refer the Bill for Scandal, and to have it expunged: But it was anſwered, that the Defendant might proceed either the one way or the other; and this being a way proper enough by the Courſe of the Court, if this Demurrer ſhould not be allowed, every Woman might be brought to ſwear, whether ſuch a Man did not lye with her.

But on the other hand it was inſiſted, that if this Demurrer ſhould be allowed, then tho' the Matter which they call ſcandalous were true; (and was in truth the only Conſideration of the Bond) yet then they could not be received to prove it.

But Sir *Jo. Churchill*, who was not Council in the Cauſe, informed the *Judge*, that the Courſe of the Court in ſuch

a Caſe was, not to put the Defendant to anſwer the ſcandalous Matter, but to ſtrike out the Word *Demurrer*, and leave the Plaintiff at Liberty to prove it: Tho' it was doubted, if the Plaintiff proved the Suggeſtion of his Bill in the principal Caſe, it would not at all have availed him.

Caſe 97.

Eodem die.

Riddle verſus *Emerſon.*

A Leaſe for Years to *A*, but by Parol agreed to be in Truſt for *A* and *B* jointly. *B* pays a Moiety of the Rent. If this is within the Statute of Frauds, *&c.*

THE Bill was, that the Plaintiff and Defendant agreeing together to take a Leaſe of a Colliery of Sir *Gilbert Gerrard*, they contracted with Sir *Gilbert* for it at a certain Rent; but by Agreement, the Leaſe was taken in the Plaintiff's Name only, but the ſame was in Truſt, that the Defendant ſhould be Joint-tenant with him, and have a Moiety of the Profits, and ſhould pay a Moiety of the Rent: And Sir *Gilbert Gerrard*, both at the ſealing of the Leaſe, and before, had refuſed to let it to the Defendant, but upon Condition, that the Plaintiff ſhould be permitted to receive a Moiety of the Profits, and be anſwerable for a Moiety of the Rent: And Sir *Gilbert* had, ſince the making of the Leaſe, demanded and received a Moiety of the Rent of the Plaintiff.

To this Bill the Defendant pleaded the Act of *Frauds* and *Perjuries*, and that this pretended Truſt was not declared in Writing according to the Act.

For the Plaintiff it was inſiſted, that this was a reſulting Truſt, and ſuch a Truſt as the Law would create; and therefore there needs no Declaration of it in Writing; for the Rent in this Caſe reſerved is the Conſideration of the Leaſe, and a Moiety of that being according to the ſaid Agreement paid by the Plaintiff, *that* raiſes a Truſt to him for a Moiety of the Profits: And this is a plain reſulting Truſt, for a Leſſee rendring Rent is in nature of a Purchaſor, and ſhall have the ſame favour in Equity, as was reſolved in the Caſe of *Woodroffe* and *Cooke*.

Then

Then it was inſiſted that this was only a Leaſe for three Years, on which more than two full Thirds of the beſt improved Rent was reſerved, and was therefore excepted out of the Statute.

But it was anſwered, that there is no Colour to make this a reſulting Truſt: Indeed where *I. S.* buys Lands, and pays the Purchaſe Mony; if the Conveyances are made to *I. D.* this will be a reſulting Truſt: But in the preſent Caſe, to make a Man a joint Leſſee with one, that is ſole Leſſee by the Leaſe in Writing, becauſe the Landlord has ſince accepted a Moiety of the Rent of the other, is ridiculous; neither from this matter, *ex poſt facto*, can a reſulting Truſt be raiſed by conſtruction for the Plaintiff; and that by an Act, *viz.* the Payment of the Rent, to which the Defendant was neither conſenting nor privy.

And as to the other Matter, that this is a Leaſe for three Years only, on which two full thirds of the improved Rent is reſerved, and ſo out of the Act; the Anſwer is plain; ſuch a Leaſe may be made by Parol, but when ſuch a Leaſe is made in Writing, the Truſt of that Leaſe cannot be declared by Parol. But the Judge being doubtful, tho' inclined to over-rule the Plea, the Council conſented, that the word Plea ſhould be ſtruck out, and that it ſhould ſtand for an Anſwer.

Bird verſus *Hardwicke.*

Caſe 98.

Eodem die.

A Man is not bound to diſcover what may ſubject him to the Penalty of an Act of Parliament.

THE Bill charged, that the Plaintiff having ſeveral great Quantities of Port Wine on board ſeveral Ships in the River, and the Defendant having likewiſe ſome of the ſame Wines, he on purpoſe to raiſe the Price of the Market, and to ſell his own Wines at a better Rate, and unjuſtly to retard and obſtruct the Plaintiff in the Sale of his, cauſed the Plaintiff's Wines to be ſeized

as *French* Wines, and detained till the Defendant had ſold all his own Wines; and that then the Defendant relinquiſhed his Proſecution, well knowing that the Plaintiff's Wines were *Port* Wines, and not *French* Wines: And therefore it was prayed that the Defendant might anſwer the Premiſes, in order to the Plaintiff's bringing an Action on the Caſe for Damages.

The Defendant pleaded the Act for prohibiting of *French* Wines, and a penal Clauſe therein on any Man that ſhould ſeize or cauſe to be ſeized any Wines, as *French* Wines, and afterwards compound the Matter or relinquiſh his Proſecution; and inſiſted that this Bill being to ſubject him to a Forfeiture, he was not bound to anſwer it.

The Plea was allowed.

Caſe 99.

Eodem die.

Hanne verſus *Stevens.*

A Truſtee for three Perſons is called to an Account. All the *ceſtuy que* Truſts muſt be Parties.

THE Bill being to have an Account of a Truſt, the Defendant pleaded he was intruſted for three Children, *viz.* for the Plaintiff and his two Brothers; and that the other two not being made Parties to the Suit, he was not bound to anſwer; for otherwiſe he might be thrice called to an Account for the ſame Matter.

The Plea was allowed.

Caſe 100.

Eodem die.

Coram Juſtice Charleton.

Moore verſus *Hart.*

Father on a Treaty of Marriage of his Daughter does by a Letter written to a third Perſon agree to give

THE Bill being, That the Defendant intimating to the Plaintiff's Friends that he intended to give 4000 *l.* Portion with his Daughter, and having made it appear, that he was able ſo to do, the Plaintiff with his Approbation became a Suitor to his Daughter: But after, when the Defendant underſtood that the Plaintiff had a

real

real Affection for his Daughter, and that they had mutually engaged to Marry each other, then the Defendant began to recede from his Promiſe, and pretended he could not part with ſo much of his Eſtate at preſent, but would give his Daughter in Poſſeſſion the Moiety of a Farm called *Creaton* at *Wapenham* in the County of *Norphampton*, (the whole being, as he pretended, worth 4000 *l.*) and the other Moiety after his Death; if the Plaintiff would accept of ſuch Portion; and did declare ſo much by Letter under his Hand, with an Intent to encourage the Plaintiff to marry his Daughter: But the Plaintiff, finding him to vary in his Propoſals, acquainted his Friends therewith, and deſired them to come to a Certainty with the Defendant touching the Portion he would give with his Daughter, if the Plaintiff ſhould marry her: Whereupon a Letter was wrote to the Defendant by a Friend on the Plaintiff's behalf, deſiring the Defendant to be plain, and to aſcertain what Portion he would give the Plaintiff with his Daughter, if he ſhould marry her: And the Defendant, about *January* 1680, came to this final Agreement touching the ſame, *viz.* that the Defendant ſhould give and he did then promiſe and agree to give down upon the Marriage with his ſaid Daughter to the Plaintiff 1500 *l.* and to leave him 500 *l.* more at his death, in caſe there ſhould be any Iſſue of the intended Marriage; and did alſo agree, that both the Sums ſhould be charged on his ſaid Eſtate at *Creaton*: which Promiſes and Agreements were put into writing, and ſigned and ſubſcribed by the Defendant: And he did in a Letter, in anſwer to the ſaid former Letter, expreſs and declare as much under his Hand.

1500 *l.* Portion with his Daughter in Marriage, this is binding and out of the Statute of Frauds. *Vid. Poſt Caſe* 197.

That about *February* 1680, in purſuance of the Agreement, the Marriage was ſolemnized; and the Defendant often after, as well as before, declared he would perform his Promiſe and Agreement; and the Plaintiff upon his Marriage became juſtly intitled to the ſaid Portion, and might well expect the ſame, it being but half of what the Defendant

fendant at firſt voluntarily undertook to give, and much inferior to the Plaintiff's Eſtate. That the Defendant refuſes to pay the 1500 *l.* and 500 *l.* and pretends he never made any ſuch Promiſe or Agreement *with the Plaintiff*, and thinks by that Nicety to avoid the Performance thereof. Whereas tho' the Agreement was not actually made with the Plaintiff, yet it was made with a Friend of the Plaintiff's on his behalf. That the Defendant pretends the Marriage was had without his Conſent or Privity, and that whatſoever he wrote in any ſuch Letter, the ſame ought not to conclude him, becauſe it was not a full Agreement on both ſides; there being no Proviſion for a Jointure; when as the Defendant never demanded any, well knowing his Daughter would be intitled to Dower: And whereas he pretends the Marriage was without his Conſent; *that* was by his own Contrivance; for when he found the Plaintiff's Affection ſet on his Daughter, he contrived to have her marry the Plaintiff without his ſeeming Privity, and gave her Directions ſo to manage the Matter, that he might thence raiſe a Pretence to avoid Payment of the Portion; and was, and did acknowledge himſelf, well pleaſed with the Marriage, and knew when it was ſolemnized. That the Defendant at other times pretends, the Plaintiff's Eſtate deſerves not ſo great a Portion, altho' he has owned by Letters and otherwiſe, that he eſteemed the Propoſals touching the Marriage as a great Honour to him, and declared his only fear was, he ſhould not be able to give a Portion equivalent with the Fortune offered him: And at other times he pretends, he is not able to give 2000 *l.* Portion, altho' in truth he is ſeized of Lands of Inheritance of 4 or 500 *l. per Ann.* and threatens that he will ſecretly convey away all his Eſtate to prevent the Plaintiff's receiving the fruit of the Agreement: and therefore that the 1500 *l.* might be paid down, and the 500 *l.* ſecured, was the Bill.

To this the Defendant pleaded, that by an Act intitled *An Act for Prevention of Frauds and Perjuries*, made 29

nunc Regis at the Parliament begun at *Weſtminſter* 18 *die Maij Anno* 13 *Regis nunc*, and from thence continued by ſeveral Prorogations to the 15th of *February* 1677, it was, amongſt other things, Enacted, that from and after the 24th of *June* 1677 no Action ſhall be brought, whereby to charge any Perſon upon any Agreement made upon Conſideration of Marriage, or upon any Contract or Sale of Lands and Hereditaments, or any Intereſt in or concerning them, unleſs the Agreement upon which ſuch Action ſhall be brought or ſome Memorandum or Note thereof ſhall be put into Writing, and Signed by the Party to be Charg'd therewith, or by ſome other Perſon thereunto by him lawfully Authorized, *Prout* the Act. And doth Aver, that neither he nor any other by him Authorized, did make, ſign, or ſeal any Contract or Agreement in Writing to any ſuch Effect or Purpoſe, as by the Bill is ſuggeſted, or any Note or Memorandum thereof, or of any Agreement to that Effect: And that the Plaintiff's Marriage was without his Knowledge, Privity or Conſent, and without any Agreement in Writing made or concluded upon in reference thereunto. And therefore he pleads the ſaid Matter in bar of the Plaintiff's Bill, and demands Judgment.

For the Plaintiff it was inſiſted, that this was no good Plea; for he has not at all anſwered to the particular Circumſtances of the Caſe charged in the Bill, which will much influence the Caſe in Equity, which is ſtrong here; the Agreement in this Caſe being already executed on one Side; and here he does not deny, that he wrote ſuch a Letter as is mentioned in the Bill; but takes upon himſelf to judge, that ſuch a Letter does not amount to a ſufficient Note or Memorandum of an Agreement in Writing within the Act: And what he has ſaid touching the Agreement is not by way of Anſwer, but only Averred in the Plea; ſo that if this Plea ſhould ſtand we cannot Except, as we might to his Anſwer, where it is not full, whether he made ſuch Agreement or not: And here he has Pleaded an Act of Parliament; whereas there is in Truth no ſuch Act: for

he Pleads, that at a Parliament begun at *Weſtminſter* 18 *die Maij, Regis nunc,* and from thence continued by ſeveral Prorogations to the 15th of *Feb.* 1677: Whereas the Act of *Frauds* and *Perjuries* was made at a Parliament begun the 8th of *May,* and not on the 18th, and was continued by Prorogation to *Feb.* 1676, and not to *Feb.* 1677: So that he has quite miſpleaded the Act; and that muſt be fatal upon him: For *Pleas* and *Demurrers* are not to be more favoured in Equity, than they are at Law; it being here only to prevent anſwering: And beſides, the Statute of *Frauds* and *Perjuries* being a publick Act, he will have the Benefit of it at the hearing: And tho' this is a publick Law, yet if he will take upon him to plead it Specially, and miſtakes, it is as fatal to him as the miſpleading of a private Act would be. And they cited the Caſe of *Love* and *Wotton, Cro. Eliz.* 245. where the Defendant had pleaded the Statute of *Uſury* to be made *6 die Feb.* 13 *Eliz.* whereas it was made 2 *die Feb.* And in that Caſe, tho' after a Verdict, and tho' the Plaintiff in his Replication had admitted there was ſuch an Act, yet the Court unanimouſly declared, that the Statute againſt Uſury being a publick Law, they were bound to take notice, there was no ſuch Statute, as the Defendant had Pleaded; and ſo would not give any Judgment.

Miſpleading of a publick Act of Parliament.

But *Juſtice Charleton* conceived, that Pleading ought not to be ſo ſtrictly obſerved in Equity, as it was in Law. (*mes quære*) and diſallowed the Plea upon the Merits; and ſaid, he did not know, but a Man might make an Obligation in a Letter, if he put his Hand and Seal to it.

On

ON Monday, 18 Decemb. 1682. *about four o'Clock in the Afternoon, died the Earl of* Nottingham, Lord High Chancellor *of* England, *having had the Cuſtody of the Seal for more than nine Years, and being then ſixty one Years of Age,*

December 20, *Sir* Francis North, Lord Chief Juſtice *of the* Common Pleas, *was made* Lord Keeper, *and had the* Great Seal *delivered to him at the Council Board on* Wedneſday *Night, and the next Day kept a private Seal for Writs, at his Houſe in* Chancery-Lane.

On the 23*d Day of* January, *being the firſt Day of the Term, the* Lord Keeper *took his Oath as* Lord Keeper, *which was Adminiſtred to him by the* Maſter of the Rolls. *And then Mr.* Saunders *was brought to the Chancery Bar, to take his Oath, as* Serjeant at Law, *had his Writ read, and prayed his Appearance might be recorded, and was then Sworn, and afterwards preſented the* Lord Keeper *with a Ring for himſelf, and another for the* King, *inſcribed,* Principi ſic placuit: *And afterwards the* Lord Keeper *went into the* King's Bench, *and made a Speech to Mr.* Saunders, *and called him up to the* Bench, *and Swore him* Chief Juſtice; *and afterwards went into the* Common Pleas, *and made a Speech to the* Lord Chief Juſtice Pemberton, *who was removed from being* Chief Juſtice of the King's Bench, *to be* Chief Juſtice of the Common Pleas.

DE
Termino S. Hillarii,

34 & 35 *Car' II.* 1682.

In Curia Cancellariæ.

Case 101.
11 Januar.
In Court Lord Keeper.
Motion to dismiss a Bill on Payment of 20*s.* Costs.

Anonimus.

UPON a Motion made to dismiss a Bill (wherein Plaintiff had proceeded to an Answer only) with 20*s.* Costs: *per Lord Keeper, that* was a Rule made at least 50 Years since; and he saw no reason, if a Defendant had been put to greater Charge, why he should not have his full Costs: And that for the future it should be referred to a Master to Tax the Defendant his Costs in such Case.

Case 102.
Eodem die.
Motion for a Messenger upon a *Cepi Corpus* return'd by the Sheriffs of *London.*
Vid. post Case 143.

Anonimus.

UPON a Motion for a Messenger upon a ***Cepi Corpus***, the Defendant living in *London, Lord Keeper* said, this had been looked upon as a Motion of Course; but in truth it was grounded upon a Mistake; for to his Lordship's Knowledge, the Officers of the City have not their own Amercements: They have no Royal Amercements.

Williams

Williams verſus *Melliſh.*

Caſe 103.

15 Januar. *In Court Lord Keeper.* The Plaintiff not allowed to bring a Bill of Review, unleſs he performed the Decree, or would ſwear he was unable to do it, and would ſurrender himſelf to the *Fleet*, to lie there, till the Matter on the Bill of Review was determined.

UPON a Motion made by Mr. *Williams* on behalf of the Plaintiff his Brother, that Proceedings might be ſtay'd on the Decree, until the Plaintiff was heard on a Bill of Review: Mr. *Williams* inſiſted, that a Bill of Review was like a Writ of Error at Law, or an Appeal in the Eccleſiaſtical Court: and a Writ of Error at Law, till the Statute for ſpecial Bail, was in it ſelf a Superſedeas: And that as to the Precedents in Court, he had looked into them, and found there was no conſtant Rule; for ſometimes a Bill of Review had been allowed before the Decree had been performed; and at other times not.

Lord Keeper. Even before the Statute for ſpecial Bail on a Writ of Error, the Writ was not ſuch a Suſpenſion of the Judgment, but that a Man might nevertheleſs have had an Action of Debt on it: But I do not think there is any ſound Argument to be drawn from ſuch Compariſons. In this Caſe the Decree ſhall be performed to a Tittle before any Bill of Review be allowed; unleſs the Plaintiff *Williams* will ſwear himſelf not able to perform the Decree, and will ſurrender himſelf to the *Fleet*; to lye in Priſon till the Matter be determined on the Bill of Review.

Vid. poſt Caſe 158.

Anonimus.

Caſe 104.

Eodem die.

A Bill againſt a Corporation to diſcover Writings. The Defendants anſwer under their Common Seal; and ſo being not ſworn, will anſwer nothing in their own Prejudice. Ordered that the Clerk of the Company, and ſuch principal Members as the Plaintiff ſhall think fit, anſwer on Oath, and that a Maſter ſettle the Oath.

Eſtwick verſus *Conningsby.*

Caſe 105.

Eodem die.

Surviving Partner trading on his own Account with the Debtors to the Partnerſhip.

Ordered, that an Attorney be Appointed to ſue for the Debts, unleſs the ſurviving Partner would give Security to Anſwer a Moiety of the Debts to the Adminiſtratrix of the deceaſed Partner.

THE Plaintiff's late Husband (to whom ſhe is Adminiſtratrix) and the Defendant being Copartners for many Years in the Trade of a Druggiſt, the Plaintiff's Bill was to have a Diſcovery of the Eſtate, and her Proportion and Dividend thereof according to the Articles of Copartnerſhip. The Defendant Anſwered; and it appearing that many Debts owing to the joint Trade ſtood out, It was now moved on the Behalf of the Plaintiff, that an able Attorney might be appointed to ſue for and recover theſe Debts; it being alledged in the Bill, that the Defendant carrying on a Diſtinct Trade for himſelf with the Perſons that were Debtors to the joint Trade, to oblige them he forbore to call in their Debts; and it was Ordered accordingly, unleſs the Defendant within a Week would give Security to the Plaintiff to anſwer her Moiety of the Debts that were ſtanding out.

Anonimus.

Caſe 106.

16 Januar.

In Court Lord Keeper.

After a Decree for a Perſonal Duty a Sequeſtration iſſues, and then the Defendant Marries and dies.

If the Sequeſtration ſhall take place of the Wife's Dower.

Vid. poſt Caſe 157.

ON a Demurrer; the Plaintiff's Bill was to revive a Sequeſtration obtained againſt the Defendant's Husband for a Perſonal Duty before his Intermarriage with the Defendant, and to avoid the Defendant's Eſtate in Dower in the Lands, that were Sequeſtred before the Marriage, it being inſiſted that theſe Lands were ſo bound by the Sequeſtration, and covered therewith, that the Defendant's right of Dower could never attach them.

To this Bill the Defendant Demurred, and the Demurrer was allowed by the Lord *Keeper*. And the Council at the Bar deſired to know his Lordſhip's Opinion, whether the Heir in Fee ſimple ſhould in ſuch Caſe have the Eſtate bound, and ſubject to ſuch a Sequeſtration, or not? But

the Lord *Keeper* refuſed to declare his Opinion therein, ſaying, that Caſe was not now before him.

Arch-Biſhop of York verſus . . . . . .

Caſe 107.
18 Januar.
In Court Lord Keeper.

No Writ *de Cautione Admittenda* ought to Iſſue, till Affidavit filed, that the Biſhop refuſed to admit of Caution.

UPON a Motion made by Mr. *Bellwood* for a Superſedeas to a Writ *de Cautione Admittenda*; for that they had taken a Writ to the Sheriff without any Affidavit filed, that the Biſhop refuſed to Admit of Caution, and for that reaſon a Superſedeas was awarded. And the Lord *Keeper* declared, that finding this Court often troubled for Writs *de Cautione Admittenda*, he thought the Right of it was, that if there was a Sentence for a Man to pay Mony, or to do any other thing in the Spiritual Court, a Man ought firſt to perform that, before he is admitted to his Writ *de Cautione Admittenda*: For it is in vain to take Security *Parere Mandatis Eccleſiæ*, whilſt a Man refuſes to obey the Sentence. *Sed Quære.* For ſuppoſe a Man be excommunicated for not coming to Church, or not receiving the Sacrament; how can he do that, till his Caution is admitted and he abſolved?

Anonimus.

Caſe 108.
Eodem die.

An Executor pleads, he has no Aſſets *ultra* 100 *l.* to three ſeveral Actions. Judgment is had in each for 100 *l.* upon which he brings his Bill and moves for an Injunction, which is denied.

UPON a Motion made by Mr. *Stedman*, where three ſeveral Actions at One time were brought againſt an Executor, and he to each Action pleaded *Riens enter maines ultra* 100 *l.* and ſo upon each Action there was a Judgment for 100 *l.* and therefore prayed an Injunction, But it was denied by the Lord *Keeper*. In Caſes proper for Law a Man muſt defend himſelf by Legal Pleadings; and every Executor ought to be careful in the firſt Place to cover all his Aſſetts with a Judgment.

Anoni-

Caſe 109.

Eodem die.

Anonimus.

Motion by the King's Patentees for an Injunction to ſtop the Sale of Engliſh Bibles printed beyond Sea.

UPON a Motion for an Injunction to ſtop the Sale of Engliſh Bibles printed beyond Sea, It was urged, that the *Chancery* was a Court of State, and therefore for the great Miſchief that might ariſe from theſe Bibles, if they ſhould be ſuffered to be publickly ſold, the Sale ought to be prohibited by this Court, Upon that politick Account, as well as to quiet the King's Patentees in their Poſſeſſion.

Lord Keeper. I do not apprehend the *Chancery* to be in the leaſt a Court of State: Neither can I grant an Injunction in any Caſe, but where a Man has a Plain Right to be quieted in it: And, tho' the Patent for Law Books has been adjudged good in the *Houſe of Lords*, yet that is not exactly the ſame Caſe with this, tho' near it.

Vid. poſt Caſe 274.

Let there be a Tryal at Law, and let the King's Patentees be Plaintiffs, and the Defendants admit they have ſold *twelve* Bibles. And when the Tryal is over, come back again.

Caſe 110.

23 Januar.

In Court Lord Keeper.

Anonimus.

UPON a Motion for an Injunction to ſtay Proceedings on a Bond, upon Offer made to give Judgment with a Releaſe of Errors; But the Lord Keeper anſwered, that he did not think that ſo beneficial an Offer as it might be looked upon; for that notwithſtanding the Releaſe of Errors the Plaintiff might bring his Writ of Error and put the Defendant to plead his Releaſe, and ſo delay time as long as if no Releaſe of Errors had been given. But upon the Plaintiff's offering to be bound by Order to bring no Writ of Error an Injunction was awarded.

Gerrard

Gerrard verſus *Vaux.*

Caſe 111.
Eodem die.
In Court Lord Keeper.

Agreement to quit the Poſſeſſion of Land will not oblige a Man to convey.

THE Bill was to have an Execution of an Agreement. But upon the Proof it appearing, the Agreement was only, that the Defendant would quit the Poſſeſſion of the Lands, and not that he would convey all his Eſtate in thoſe Lands, the Bill was diſmiſſed. But the Lord *Keeper* ſaid, If the Agreement had been to have conveyed thoſe Lands, altho' he was not appriſed what Eſtate he had in them, yet he ſhould have decreed the Agreement.

Curſon verſus *African Company.*

Caſe 112.
Eodem die.
In Court Lord Keeper.

Want of Parties.

IT was objected againſt the Plaintiff, that he had not brought proper Parties to hearing, the Bill being to be relieved for a Debt owing from the Old *African* Company, and they had brought to hearing the New *African* Company only.

The Lord *Keeper* objected, that the old Company were in a manner *in nubibus*, tho' their Charter was not ſurrendred, as was objected at the Bar, for he knew how that matter was. The old Company were almoſt Two Hundred Thouſand Pounds in Debt; ſo that their Credit was loſt, and they could not carry on their Trade; and therefore, that the Trade might not be loſt to the Nation, it was neceſſary that a New Company ſhould be erected, which was ſo done; and the King accepted no Surrender from the old Company of their Charter; But they are a Company ſtill in being: the new Company (which in truth are almoſt all the ſame Men as were of the old Company) bought the old Company's Stock and Effects at the true Value, and the Mony was to be applied for Payment of the Debts of the old Company: But that,

which ſtuck with him in this Caſe, was; he did not ſee how a Company that had no Eſtate could be compelled to appear. Upon which it was urged, the Plaintiff might take out a *Diſtringas* againſt the Company, and have it returned *nihil*, and ſo get a Sequeſtration againſt them; and then by the Courſe of the Court the Plaintiff need not to bring them to hearing. But then for the Plaintiff it was ſaid, that the Plaintiff had an Order made in this Cauſe that the Defendants ſhould take no Advantage at the hearing for want of proper Parties: To which it was replied, ſuch an Order was in it ſelf void, and could not take away the Defendants juſt Exceptions, unleſs it had been by Conſent.

Lord Keeper ordered the Plaintiff's Council to go on and open the Cauſe: And after Debate the Plaintiff agreeing to take, as other Creditors had done, 40 *l. per Cent.* with Intereſt for his Mony, he was ordered ſo to do: and was likewiſe ordered to allow 100 *l.* Debt that was owing by him to the Company; for that it is the Cuſtom of Companies, that if they owe a Man 100 *l.* they will give him Credit for ſo much; and therefore in reſpect of a Company, Stoppage is to be allowed as a good Payment.

Harvey verſus *Montague.*

Caſe 113. 26 Januar. *In Court Lord Keeper. Vid. ante Caſe 53.*

THE Caſe was, Mr. *Harvey* being poſſeſſed of a great Perſonal Eſtate died, and made the Plaintiff Sir *Thomas Harvey* and Mrs. *Elizabeth Harvey* his Widow Executors, and directed by his Will that 20000 *l.* of his Perſonal Eſtate ſhould be inveſted in Lands, and that Mrs. *Harvey* ſhould receive the Profits thereof for her Life, and made Sir *Thomas Harvey* Reſiduary Legatee.

Sir *Thomas Harvey* Exhibited a Bill againſt Mrs. *Harvey*, ſetting forth that he was reſiduary Legatee, and yet Mrs.

Harvey had got the whole Eſtate of the Teſtator into her Hands, and converted it to her own Uſe.

Mrs. *Harvey* inſiſted on a Deed made during Coverture, whereby the greateſt part of her Husband's Eſtate was ſettled in Truſt for her. But Sir *John Coell* depoſed, that this Settlement being made in the late Times was contrived only to prevent Sequeſtration; And that Cauſe coming on to be heard, ſhe was decreed to Account to Sir *Thomas Harvey* for the Perſonal Eſtate, and that the Deed of Truſt ſhould be ſet aſide, and ſhe ſhould receive no more of the Teſtator's Eſtate; upon which ſhe goes into *France*, and refuſes to Perform the Decree, and was under a Sequeſtration: afterwards Sir *Thomas Harvey* Exhibits a Bill againſt the now Defendant Mr. *Mountague*, ſetting forth, that he owing 10000*l.* and Intereſt on a Mortgage to Mr. *Harvey* the Teſtator, and that Mr. *Mountague* knowing of the former Decree, and having been preſent at the hearing of that Cauſe, and at the time when the ſaid Decree was pronounced, had ſince, with an Intent to elude and avoid the Decree, paid this Mony to Mrs. *Harvey*, as he pretended: Whereas if he had paid the Mony, it was with Notice and after the former Decree, and therefore it was prayed, that Mr. *Mountague* might pay this 10000*l* with Intereſt.

The Defendant inſiſted, that he had paid and fully ſatisfied all the Mortgage Mony on ſuch a Day in *July*, which was in time Subſequent to the Decree; and that he having paid it to a Perſon, that in Law was well Intitled to receive it, and having a Legal Diſcharge for the ſame, and being no Party to the former Decree, nor bound by it, nor ever ſerved with any Order upon it, he ought not in a Court of Equity to be compelled to pay it over again.

This Cauſe came on to be heard before the Lord *Chancellor Nottingham*, in *Michaelmas Term* laſt, and the Proof on behalf of the Plaintiff being, that the Defendant Mr. *Mountague* was an intimate Acquaintance of Mrs. *Harvey*'s, and

and one with whom ſhe adviſed in the Management of her Affairs; and that he was preſent in Court at the time of the Decree pronounced, it was therefore held by the *Court*, that this was no good Payment: tho' for the Defendant it was inſiſted, that this was no legal Notice to Mr. *Mountague*; that he was no Party to the former Decree, nor bound by it, nor was ever ſerved with any Order upon it: and that he now having really paid his Mony (as the ſame was fully in Proof) and having a good and legal Diſcharge for it, it was a very hard and ſtrange Demand in Equity to compel him to pay it again: and in truth that Clauſe in the Order, that Mrs. *Harvey* ſhould receive no more of the Teſtator's Eſtate, was inſerted in the Decretal Order by the Clerk, who drew up the Decree, and was not in the Minutes; nor directed by the Court: and the Decree is not, that no Perſon ſhall pay any Mony to Mrs. *Harvey* (for that in it ſelf would be a void Clauſe to all, that were not Parties to the Decree) but only, that ſhe ſhould receive no more: And if Mr. *Mountague* be decreed to pay this Mony to the Plaintiff, he will not only be decreed to pay his Mony twice, but in truth the Plaintiff will have a double Satisfaction decreed him: for by the former Decree Mrs. *Harvey* is to Account to him for all Moneys by her received, and is now under a Sequeſtration for it: and in truth the Plaintiff has received Satisfaction for it by the Sequeſtration, having under it not only received the Profits of the 20000*l.* which ſhe was to receive for her Life; but alſo the Profits of 1500*l. per Ann.* which is her own Land of Inheritance; and that therefore theſe Decrees were repugnant, and did fight with one another.

But notwithſtanding all that could be ſaid, the Payment to Mrs. *Harvey* was decreed to be an Ill Payment; and it was referred to a Maſter to take the Account.

After this the Plaintiff got a Report *ex parte*, and Mr. *Mountague* having Petitioned, and moved by his Council for a Rehearing, was denied it: and then he moved to go back

back to the Maſter (this being but a Report *ex parte*) which at laſt was obtained: And it being alledged, that Mr. *Mountague* had paid Mrs. *Harvey* ſome Mony for her Neceſſities before the firſt Decree, it was directed that what he had really paid, before the Decree, of the Principal or Intereſt ſhould be allowed him on Account, and his own Oath to be taken as to the Intereſt.

When he came before the Maſter, he proved that he had actually paid 7500 *l.* of the Principal Mony, even before the firſt Decree pronounced; And the Maſter made his Report to that Effect.

And now the Matter coming before the Lord *Keeper* upon Exceptions to the Maſter's Report, the Proofs for the Defendant were made by one Mr. *Phalizo*, that the Defendant, juſt before he was recalled from his Embaſſy in *France*, had returned thither 5000 *l.* in Mony, which was left in *Phalizo*'s hands, and had raiſed by the Sale of the Furniture of his Houſe there the Sum of 2500 *l.* more, which was likewiſe left in *Phalizo*'s hands, and that the Defendant Mr. *Mountague* had Bills from *Phalizo* for payment of this Mony; and that Mr. *Mountague*, before the firſt Decree pronounced, gave Orders to Mrs. *Harvey* to receive this Mony of *Phalizo*, who ſwore, that thereupon he became her Pay-maſter; and that afterwards in time Subſequent to the firſt Decree, Mr. *Mountague* gave new Orders or Bills to Mrs. *Harvey* to receive this Mony; and that thereupon, ſhe having Occaſion for it, he did actually pay it to her, and ſhe with her own Hand indorſed on the Counter-part of the Mortgage the Receipt of this Mony.

Hereunto for the Plaintiff it was Objected, That the Defendant could not be admitted to this Proof, it being contrary to his own Oath, who in his Anſwer had ſworn the Mony paid on ſuch a Day in *July*. *Secondly*, That *Phalizo*'s Depoſition ought not to be read in this Caſe; for that he before the Hearing was examined in chief upon

an Interrogatory, that led him to diſcover the ſeveral times of the now pretended Payments; and that therefore he ought not to be examined to the ſame Matter again after the Hearing; for now Publication being paſſed, and the Defendant ſeeing where the Matter pinched, would ſupply it by ſtraining of *Phalizo*'s Evidence. If ſuch a Proceeding ſhould be allowed it would occaſion Perjury, and eſpecially in this Caſe, where *Phalizo* has ſworn the Mony paid in *July*. *Thirdly*, Admitting the Caſe to be according to this new Proof, yet in truth, this is no Payment, for Mr. *Mountague* might have revoked his Orders given to *Phalizo* for Payment of this Mony to Mrs. *Harvey*; and the Mony was not actually received till after the firſt Decree; and that Bills of Exchange are not Aſſigneable, but by Indorſement only; and it carries a Suſpicion with it, that there is no Witneſs, either to the Orders given to Mrs. *Harvey*, or to the Indorſement on the Mortgage Deed; and the Indorſement is not upon the Original Deed but on the Counter-part remaining in Mr. *Mountague*'s poſſeſſion.

To this it was Anſwered, that Mr. *Mountague*'s Anſwer and *Phalizo*'s former Depoſitions were very conſiſtent with what was now proved before the Maſter; for tho' they ſwore the Mortgage was fully ſatisfied and paid on ſuch a day in *July*; yet great part of the Mony might have been paid before, as in truth it was, tho' the Compleating Payment was not made till *July*: and that the Plaintiff's Council could not be in earneſt, when they Objected againſt *Phalizo*'s being Examined after the Hearing; for that was never denied in matter of Account, and was ſo ſettled in the Caſe of *Sandys* and *Daviſon* in the Lord *Hyde*'s time upon long Debate: and that Mrs. *Harvey* accepting of theſe Bills, and *Phalizo* ſwearing he then became her Paymaſter, and her receiving the Mony upon them afterwards, makes this a good Payment *ab initio*. That Mr. *Mountague* could not have ſo revoked his Orders, but that Mrs. *Harvey* might have required Payment thereof afterwards; and *Phalizo* might have juſtified his Payment thereof: And as to the

Indorſement's being made on the Counter-part of the Mortgage, the Defendant's Council conceived that was moſt proper; it being fit Mr. *Mountague* ſhould have the Evidence for the Payment of his Mony in his own hands: and tho' there was no Witneſs to it, yet it was fully proved to have been all writ with Mrs. *Harvey*'s own hand: And it is an Evidence of the Sincerity of this Payment, and that it was not done with a deſign to have ſerved a turn; for if ſo, Mr. *Mountague* might have eaſily removed all theſe Doubts. But the Lord *Keeper* allowed the Exceptions to the Maſter's Report, and ordered Mr. *Mountague* to repay the whole Money.

Eaſt India Company verſus *Sandys.*

Caſe 114.
27 Januar.
In Court Lord Keeper.
Injunction denied to ſtay an Interloper's trading to the *Eaſt Indies*, till the Validity of the *Eaſt India* Company's Patent has been tried.

THE *Eaſt India Company* exhibited a Bill againſt the Defendant *Sandys* an *Interloper*, ſetting forth, their Patent for the Sole Trade to the *Eaſt Indies*, and the great Power that was thereby given them; And particularly the Clauſe in the Patent, that whoſoever ſhould trade thither, not being of the Company, ſhould forfeit the Value of ſuch Goods and Commodities wherein they ſhould ſo trade; one Moiety thereof to the Company, and the other Moiety to the King: but they were willing to wave their Forfeiture: And ſetting forth what Places and Towns they had in the *Eaſt Indies*, and that they had there above 150000 Men under their Government; and that they had been at above 50000*l.* Charge in ſecuring their Trade in thoſe Countries, and that they had purchaſed divers Privileges of the *Princes* there; and that the Defendant, tho' he was not of the Company, had traded thither with the Plaintiffs Mony, and under their Colours; And that by reaſon of his trading thither and bringing Goods and Merchandizes from thence, they had ſuffered great Damage, and were forced to ſell their Goods at Lower Rates; and that the Defendant ought to anſwer Damages for the ſame. And that now to their further Prejudice the Defendant continued on his Trade in the *Indies*,

Indies, and had laded a Ship called with Commodities to be tranſported thither, and prayed a full Diſcovery, *&c.*

To this Bill the Defendant anſwered, and demurred. By Anſwer he denied he traded with the Plaintiffs Mony, or under their Colours; and that he did not know what had been done in the *Indies*; for that he was never there, *&c.* And for Demurrer, That the Bill tended to make the Defendant liable to a Forfeiture, as appeared by a Clauſe in the Company's Patent ſet forth in their Bill; And that of their own ſhewing, their Patent was a *Monopoly*, and in it ſelf void, *&c.* And that he was not bound to diſcover whether he was ſending any Goods to the *Indies*, or what Goods he had brought from thence, *&c.*

This Demurrer coming on to be argued before the Lord *Keeper*, for the Plaintiffs it was inſiſted, that this was only an Auxiliary Bill for a Diſcovery, in order to a legal Tryal; and that an Anſwer could not hurt the Defendant, for that the Plaintiffs by their Bill had waved the Forfeiture. That the Company had been of an ancient ſtanding and long Continuance, and their Patents from time to time renewed, and confirmed by ſeveral ſucceeding *Kings*; and that the Antiquity of their Poſſeſſion, which had not been till now of late Interrupted by theſe Interlopers, entitled them to the Protection of this Court; and that therefore it was but reaſonable they ſhould have an Injunction for quieting of their Poſſeſſion; and that it was no *Monopoly*, as was pretended, for that they always licenced People to trade to the *Eaſt Indies*, tho' they were not of their Company, on Payment of a reaſonable proportion of the neceſſary Charge and Expence, which the Company had been at for the Support of their Trade thither; and it was but natural Juſtice they ſhould ſo do; as in the Caſe of *Sewers*; all are made to contribute, that receive Benefit by what is done by the Commiſſioners: And for Precedents, they inſiſted on the Caſe of the *Eaſt India Company* and *Foſcue*, and the *Bookſellers* Caſe; And that it was lately ruled

ruled in the *Exchequer*, in the Caſe of the *ſixty Chancery Clerks* on a Bill to diſcover, whether they had paid the King's Duty; and there, tho' the Defendants demurred, as here, becauſe it would ſubject them to a Forfeiture, yet they were made to Anſwer: and there has never any advantage been taken of ſuch Forfeitures: it is but like a *Subpœna ſub Centum librarum.*

But it was Anſwered, there was a great difference betwixt *Mandatory* Writs and *Patents* that create Rights; and the Plaintiffs ſaying in their Bill, that they will take no Advantage of the Forfeiture, will not protect the Defendant in an Action at Law: But if it would, the Plaintiffs can wave but a Moiety of the Forfeiture, and cannot wave the King's Moiety: and their Patent muſt, as againſt them, be taken to be good, even in that Clauſe of the Forfeiture, tho' may be it is the Weakeſt Clauſe of it. And it was further inſiſted, that this Patent was a *Monopoly*, and the Plaintiffs had very boldly inſerted it in their Bill, and ſuggeſted, that by reaſon of the Defendant's Trading to the *Eaſt Indies* they had been forced to ſell their Goods for little more than half what they were really worth; Which ſhew'd the Oppreſſion of this Patent upon the People.

How far the Plaintiffs by their Bill waving a Forfeiture, when one Moiety thereof belongs to the Crown, will prevent a Demurrer.

Lord Keeper. I muſt in this Caſe be governed by Law, and the Validity of the Patent is properly triable there; and till it is determined there, I do not ſee, how I can grant an Injunction; tho' I am far from thinking the Patent void, which has been confirmed by ſo many ſucceeding *Kings*; and ſince there have been divers Parliaments, that have taken Notice of other Matters, but never reflected on this Patent as void or againſt Law.

The Reaſons given, why this Bill ſhould not be Anſwered, are chiefly *Three.*

Firſt, That what the Plaintiffs complain of is but in nature of a Treſpaſs, and for that they may have Remedy

at Law: But to that it may be anſwered, In ſome Caſes even for a Treſpaſs a Bill is proper enough in this Court; as where by the ſecret Contrivance of it a Man cannot eaſily prove it; as for inſtance, if a Man in his own Ground digs a Way under Ground to my Mineral, and the like: and ſo in this Caſe there is a Difficulty as to the Proof, the Matters for the greateſt part having been tranſacted in the *Eaſt Indies*.

The *Second* Objection is, that it tends to ſubject the Defendant to a Forfeiture. I do not think there is much in that; for I take it, the Clauſe as to a Forfeiture is the weakeſt Clauſe in the Patent; and I believe many of the able Council that argue for the Company, never Peruſed the Bill; otherwiſe they would not have inſerted ſome Matters, that had been better left out.

Whether the Patent to the *Eaſt India* Company be a *Monopoly*, or only a Regulation of Trade.

Thirdly, It is Objected, that this Patent is a *Monopoly*. Certainly in its Creation it was only a Patent of Regulation; for at firſt all People were at Liberty to come in; and Patents for Regulation of Trade are exempted out of the Statute: and if it be now reduced into fewer hands, and ſo become a *Monopoly*, it is hard to ſay when it became ſuch. It is like the Vaſtneſs of the Buildings in *London* becoming a Nuſance: no One can ſay when firſt they became ſo, or which particular Houſe firſt made it ſuch. And it is to be obſerved the words of the Statute of *Monopolies* are, that there ſhall be no *Monopoly* within this Kingdom. What Influence that may have on this Caſe is worthy Conſideration. I would therefore have this Matter firſt tried at Law, and for that purpoſe let the Defendant admit, that he has bought and ſold *Eaſt India* Goods, that he brought from thence, to ſome certain Value; and when the Tryal is over, come back again; and if the Tryal go againſt the Defendant, he ſhall perfect his Anſwer on Interrogatories: But in the mean time let the Defendant put in an Anſwer without Oath, that thereby the Complainants may be intitled to the Benefit of a Commiſſion to the *Indies* to examine their Witneſſes there.

Vid. the Caſe of the *Eaſt India* Company againſt the Interlopers. 2 Ch. Rep. 165.

Grahme verſus *Grahme.*

Caſe 115.
29 Januar.
In Court Lord Keeper.

Whether Bonds of Reſignation are Simoniacal.

UPON a Motion to diſſolve an Injunction granted to ſtay Proceedings in an Action on a Bond given by an Incumbent to his Patron, that he (the Incumbent) ſhould reſign on requeſt, Lord *Keeper* ſaid, he was not ſatisfied, that ſuch a Bond was good in Law: The Precedents that were in the Caſe were not directly to the Point, whether ſuch Bonds are Simoniacal or not: he therefore directed that the Plaintiff ſhould declare on this Bond, and the Defendant plead Simony, and after that and Judgment at Law come back to the Court.

Dominus Rex verſus *Cary.*

Caſe 116.
Vid. ante Caſe 51.

This Court will not allow Writs of Error in the *King*'s *Bench* upon Judgments in the Petty Bag.

Dy. 315. *a.* 4. *Inſt.* 80.

IN a Cauſe on the *Latin* ſide, on a Motion that the Defendant *Cary* might ſtand Committed for not Vacating his Letters Patents of *Reprizals*, It was moved by Mr. *Wallop*, that they might be at Liberty to bring a Writ of Error in the *King*'s *Bench*. And cited *Dyer &c.* But the Lord *Keeper* ſaid, all thoſe Books were founded only on the ſingle Opinion of my Lord *Dyer*, and that he thought the *Juriſdiction* of *Chancery*, even of the *Latin* ſide, not ſubjected unto, nor to be Controlled by the *King*'s *Bench*; and that he would Injoyn all ſuch Writs of Error.

Anonimus.

Caſe 117.

Inrolment of a Decree may be opened, if the Inrolment was gained by Surprize, or there is ſome Irregularity in it.

UPON a Motion for a Rehearing of a Cauſe, where the Decree was ſigned and inrolled by the late Lord *Chancellor*, the Lord *Keeper* asked Serjeant *Maynard*, if he knew any Law, whereby he could juſtify the Rehearing of a Cauſe ſigned and inrolled by his Predeceſſor, for that was to Vacate a Record. The Lord *Chancellor* himſelf

ſelf was Maſter of his own Inrolments, and might upon his Memory know ſome Reaſon for rehearing of it; but he could not do it without there was ſome Surprize, or other Irregularity in the inrolling of it: But he ſaid, he had a Privy Seal that enabled him to ſign and inroll the Decrees pronounced by his Predeceſſor.

Caſe 118. ## *Franklin* verſus *Thornebury:* & è contra.

29 Januar. *In Court. Lord Keeper.*

A Voluntary Deed cancelled, and the Lands being deviſed for Payment of Debts, and Debts paid under the Will, Q. Whether Equity will relieve in ſuch a Caſe, ſince the Teſtator himſelf could not avoid ſuch a voluntary Deed?

An Agreement by an Infant decreed againſt him, he having received Intereſt under it, after he came of Age.

In the ſame Caſe, an Agreement, being void as againſt an Infant, yet was decreed; the Infant having received Intereſt under it after he became of full Age.

Caſe 119. ## *Welden* verſus *Dux Ebor':* & è contra.

Eodem die

Fine levied by a Mortgagee and 5 Years *non claim* will not bar the Mortgagor of his Equity of Redemption.

TO a Bill to redeem a Mortgage, *Welden* had pleaded a Fine with Proclamations and *non claim* for 5 Years. The Plea was over-ruled, the Mortgagee having a Right to retain the Land, till his Money was paid; and this was a new way of foreclоſing a Man of his Equity of Redemption.

Caſe 120. ## *Hardham* verſus *Roberts.*

Eodem die

Defective Surrender for the Benefit of younger Children ſupplied in Equity.

ONE Point in this Caſe was, that a Man having by his Will made Proviſion for his younger Children out of ſome Copyhold Lands, but the Surrender having been made into the hands of one cuſtomary Tenant only, the Queſtion was, whether this Defect ſhould in Equity be ſup-

ſupplied againſt the Heir: And it was decreed for the Plaintiffs, the younger Children; there being many Precedents in Court of the like nature.

Hulbert verſus *Hart.*

Caſe 121.

5 Februar. *In Court Lord Keeper.*

Bond given by one Parcener to pay to the other Parcener, his Executors or Adminiſtrators, an Annual Sum during the life of *J. S.* for *Owalty* of Partition, ſhall go to the Executor, and not to the Heir.

COparceners make a Partition by conſent; and the Lands of the one being of greater Value than the Lands allotted to the other, until an Eſtate for Life fell in: It was agreed, that that Coparcener who had the leaſt Share ſhould have a Rent of 20 *l. per Ann.* iſſuing out of the Lands alotted to the other, to make her Share equal, and a Bond was given for ſecuring the Payment of it; but this Bond for *Owalty* of Partition being made payable to him, his Executors or Adminiſtrators, the Queſtion was, whether the Heir or Executor ſhould have the benefit of this Bond.

It was admitted, if he had taken a Sum in groſs in Conſideration of the Inequality of Partition, that had been like ſelling ſo much of his Part; but here the Bond being to ſecure a growing Payment, the Heir that has the Land ought to have the Benefit of it.

Lord Keeper decreed it for the Executor; and barely upon this difference, that here was no Grant of a Rent, but a bare Agreement, and ſo he had his Election either to pay it or forfeit his Bond.

Matthews verſus *Newby.*

Caſe 122.

6 Februar. *In Court. Lord Keeper.*

A Freeman of *London* dies Inteſtate, leaving a Wife and no Child. Bill is brought againſt the Widow, who

THE Bill being to have Diſtribution of the Legatory Part of the Perſonal Eſtate of a Citizen of *London* who died inteſtate; the Defendant the Widow and Adminiſtratrix pleaded that by the Cuſtom of the City of *London*, if a Freeman dies inteſtate and without Iſſue, his

was Administratrix, for a Distribution of the Testamentary Part.

Widow ought to have her Widow's Chamber and a Moiety of the rest of the Personal Estate, and the Administrator the other Moiety; and set forth the Proviso in the Act of Distributions, that it should not prejudice the Custom of *London*, and that Administration of her Husband's Personal Estate was granted to her.

Defendant pleads that by the Custom it belonged to her as Administratrix and was not distributable by the Statute.

Plea allowed.

It was affirmed by the Council at the Bar, that it had been lately resolved in the *Kings Bench*, that the whole Estate of a Citizen of *London* was exempted out of the Act of Distributions. And thereupon the Plea was allowed. But whereas the Defendant had Demurred, for that Distribution ought to be made in the Spiritual Court, the *Lord Keeper* over-ruled the Demurrer; for that the Spiritual Court in that Case had but a lame Jurisdiction; And there being no negative Words in the Act of Parliament, he thought a Bill for Distribution very proper in this Court.

Note, It was decreed by the Lord *Chancellor Jeffreys* in *Trin.* Term 1687, in the Case of *Stapleton* and *Sherrard*, where a Man within the Province of *York* was dead Intestate, leaving a Wife and no Child, that the Wife should have one Moiety of the Personal Estate by the Custom, and that the other Moiety being without the Custom should be distributed according to the Statute of *Distributions*.

Case 123.
Eodem die.

Howard versus *Howard.*

Bill for a Distribution proper in this Court.

BILL for a Distribution of an Intestate's Personal Estate. The Defendant demurred, for that Distribution of an Intestate's Personal Estate is proper in the Spiritual Court, and not here.

The Demurrer was over-ruled for the Reasons in the last Case.

Dunny

Dunny verſus *Filmore.*

Caſe 124.

Eodem die.

A Bill having been taken *pro Confeſſo*, a Bill of Review was brought, and a Demurrer having been put into it, was allowed: and now a new Bill of Review being brought the Defendant Demurred, and for Cauſe ſhewed, that a Bill of Review lies not after a Bill of Review: and the Demurrer was allowed.

A Bill of Review lies not, after a Demurrer to a former Bill of Review allowed.

Vid. poſt Caſe 126.

Earl of Arglaſſe and *Muſchamp.*

Caſe 125.

Eodem die.

THE Defendant *Muſchamp* had Petitioned the Lord *Keeper* for a Rehearing of his Plea to the Juriſdiction of the Court, and Mr. *Wallop* in Arguing inſiſted much on the Caſe of the *Company of Horners in London*, 2 *Rolls Rep.* 471. where this Court would not meddle with the Truſt of Lands in *Cheſter*, tho' the Party was out of the Juriſdiction of the County *Palatine*, and cited the Lord *Derby*'s Caſe; and therefore much leſs ought it to anticipate the Juriſdiction of the *Chancery* of *Ireland*. *Sed non allocatur.* And the Plea was over-ruled again, the Lord *Keeper* citing only *Preſton* and *Archer*'s Caſe: and as to the Objection, that this Court was deficient in Power in this Caſe to Compel a Performance of its Decree, becauſe it could not ſequeſter the Lands in Queſtion, he looked upon that as an Objection of no weight; and it did not appear to him, but the Defendant might have other Lands in *England*; and then thoſe would be ſubject to a Sequeſtration; and therefore over-ruled the Plea.

Vid. ante Caſe 70. *Vid. poſt Caſe* 231.

12. Co. 114. 1. Ro. Ab. 374.

Price verſus *Keyte.*

Caſe 126.

Eodem die.

IN a Bill of Review you may add a new ſupplemental Bill.

Ante Caſe 124.

Anoni-

Caſe 127.

Anonimus.

A Man ſwears he received Mony as a Menial Servant, and paid it over to his Maſter. He ſhall not Account for it again. *Vid. ante Caſe* 81. & *poſt Caſe* 204.

IF a Man by Anſwer ſwears, that what he received, he received as a Menial Servant, and hath paid it over to his Maſter, he ſhall not be put to Accompt again: But he ought to diſcloſe this Matter in his Anſwer.

Hobbs verſus *Norton:* & è contra.

Caſe 128. 9 Februar. *In Court Lord Kepeer.* Iſſue in Tail under a Settlement encourages a Stranger to purchaſe an Annuity of the younger Son given by the Father's Will. Decreed to confirm the Annuity.

2 Ch. Rep. 128.

SIR *George Norton*'s younger Brother having an Annuity of 100 *l. per Ann.* charged on Lands by his Father's Will, contracts with Mr. *Hobbs* for ſelling to him this Annuity. Mr. *Hobbs* goes to Sir *George Norton*, and tells him he was about to buy this Annuity of his younger Brother, and deſired to know of him, if his younger Brother had a good Title to it, and whether his Father was ſeized in Fee at the time of the making the Will, and whether the Will was ever Revoked; Sir *George Norton* told him, he believed his Brother had a good Title to it, and that he had paid him this Annuity theſe Twenty Years, but withal told him, that he heard there was a Settlement made of his Father's Lands before the Will; and that the ſaid Settlement was in Sir *Timothy Baldwin*'s hands, and that he had never ſeen it, and therefore could not tell him what the Contents of it were, but incouraged him to proceed in his Purchaſe; telling him, he had not only paid his Brother his Annuity to that time, but had paid to his Siſters 3000 *l.* under the ſame Will. Afterwards Sir *George Norton* gets this Settlement into his hands, and would avoid this Annuity, the Lands being thereby Intailed. *Hobbs*'s Bill was to have this Annuity decreed, or Repayment of his Purchaſe Mony.

The Cauſe coming on to be heard, there was no Proof that Sir *George Norton*, at the time he encouraged *Hobbs* to proceed in this Purchaſe, had any Notice of this Settlement.

ment. But one Witneſs ſwore, that Sir *George* promiſed to confirm the Annuity to *Hobbs*: But that being but by one Witneſs, and contrary to Sir *George Norton*'s Anſwer, was looked upon as no Evidence; it not being probable that Sir *George* ſhould agree to confirm this Annuity, for then he would have been made a Party to the Deed.

Lord Keeper decreed the Payment of the Annuity, purely on the Encouragement Sir *George* gave *Hobbs* to proceed in his Purchaſe, and that it was a negligent thing in him not to inform himſelf of his own Title, that thereby he might have informed the Purchaſor of it, when he came to enquire of him: And therefore decreed Sir *George* to confirm the Annuity to *Hobbs*.

But as to the Caſe between Sir *George* and his younger Brother, that might admit of another Conſideration, being it was in Proof in the Cauſe, that the younger Brother all along was knowing of this Settlement, and therefore poſſibly he ſhould not have Advantage of drawing in a Stranger to purchaſe his Title: But the Cauſe between them not being ready for hearing, was left to come on, as it could, by the Courſe of the Court.

Vid. Caſe of Bovey *and* Smith. *Caſe* 139.

Prodgers verſus *Phrazier.*

Caſe 129.

Eodem die. *In Court Lord Keeper. Ante Caſe* 7.

THIS Day upon debating the Matter before the Lord *Keeper*, he refuſed to change the Poſſeſſion, or to do any thing in it, until the Validity of the Patent was determined in a legal Tryal; and therefore directed the Plaintiff to bring his Ejectment *Cuſtodiæ* to be tried in the *King*'s-*Bench* next Term: And the Defendant to admit the Plaintiff was once in Poſſeſſion.

Exton verſus *Greaves.*

Caſe 130.

Eodem die.
In Court.
Lord Keeper.

After a Decree to foreclose the Mortgagor and ſome Creditors, whoſe Debts were charged on the Eſtate, one of the Creditors pays off the Mortgage, and agrees with the reſt, that they ſhould redeem him at a further Day; otherwiſe he ſhould hold the Lands abſolutely.

This gives the other Creditors a new Redemption; and accordingly a Redemption decreed, tho' after 20 Years Poſſeſſion and great Improvements made.

J. D. having made a Mortgage to *J. S.* and the Mortgaged Premiſſes or the Equity of Redemption thereof being ſubjected to the Payment of divers Debts, the Mortgagee exhibits his Bill againſt the Mortgagor and all the Creditors, that they ſhould redeem or be foreclosed. The Cauſe was heard, and at the time the Creditors and Mortgagor were to pay the Mortgage Money or be foreclosed, the Defendant *Greaves* by Conſent of the Creditors (being a Creditor himſelf) pays the Money, and agrees with the Creditors, that if they would pay his Money at a further Day, they ſhould redeem him; otherwiſe that he ſhould have the Lands abſolutely.

The Creditors fail to pay the Money at the time agreed on. *Greaves* for 20 Years together enjoys the Lands, and lays out 800 *l.* in Building; and now the Creditors exhibit their Bill to redeem him.

For the Plaintiff it was inſiſted, that this was but a Mortgage in *Greaves*; and that it did not ſtand upon the ſame Foot as in the former Decree; But that upon the later Agreement there aroſe a new Equity of Redemption to the Creditors.

For the Defendant it was inſiſted, that he came in and ſtood in the place of the Mortgagee, and if the Mortgagee had not aſſigned to him, all theſe Creditors had been foreclosed by the Decree; and inſiſted on the length of time: And principally, that this was in no ſort like the Caſe between a Mortgagor and a Mortgagee: For there the Mortgagee had a Covenant for Payment of his Money, and a Bond moſt commonly for performance of Covenants: But here the Defendant *Greaves* had no way to compel the Creditors to pay him his Money; and that

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a Mortgage ought to be mutual: As one may compel to receive; ſo the other may compel to pay: And it would have been looked on as ſuperfluous and fantaſtical, for the Defendant to have exhibited a Bill to have forecloſed theſe Creditors.

But the *Lord Keeper* decreed a Redemption; becauſe theſe Lands by the new Agreement became a Mortgage in reſpect of the other Creditors in the Hands of the Defendant, and in regard of the Truſt and Confidence which they had in the Defendant, being all Creditors alike: And principally becauſe the Mortgagee had aſſigned to *Greaves* his Mortgage only, and not the benefit of the Decree for foreclоſing of the Redemption: And directed an Account to be taken, and the Defendant to be allowed only neceſſary Repairs and laſting Improvements.

Lord Keeper & al' verſus *Wyld & al'.*

Caſe 131.

9 Februar. *At the Rolls.*

Maſter of the Rolls and Lord Chief Juſtice Pemberton.

THE Plaintiffs being Mortgagees, the Bill was to diſcover Settlements, and what Eſtate the Mortgagor had in him. To this Bill the Defendants pleaded two ſeveral Settlements, whereby the Mortgagor was only Tenant for Life.

Defendant pleads Settlements made after Marriage, in purſuance of an Agreement made before, and does not ſhew what the Agreement was.

The Plea was over-ruled, becauſe the Defendants did not offer by way of Anſwer to admit the Tenant for life to be dead; that ſo the Plaintiffs might try the Validity of theſe Settlements at Law; for if they ſhould expect, till the Tenant for life was dead, their Witneſſes, that could prove the Fraud, might be likewiſe dead. Beſides, the Defendants pleaded theſe Settlements to be made after Marriage, in purſuance of Promiſes and Agreements made before Marriage, and did not ſet forth what thoſe Promiſes and Agreements were.

No good Plea.

Caſe 132.
Eodem die.
At the Rolls. Maſter of the Rolls.

Barker verſus *Wyld* and two others.

Bill againſt three for a joint demand, one of them by Anſwer ſays, he believes and hopes to prove the Debt paid.

THE Plaintiff's Bill was to have an Account of Goods delivered to the three Defendants reſpective Teſtators, who were Factors. In this Caſe there being three Defendants, one whereof had by Anſwer ſworn, he believed and hoped to prove the Plaintiff was ſatisfied his Demands; the Plaintiff replyed to the other two only; and brought the Cauſe on by Bill and Anſwer as againſt the other Defendant.

The Cauſe is heard on Bill and Anſwer as to him.

The Plaintiff could have no Decree; but on Payment of Coſts had leave to reply.

It was inſiſted, that the Plaintiff in this Caſe could have no Decree: for having brought on his Cauſe as againſt the third Defendant on Bill and Anſwer only; his Anſwer muſt be taken to be true: and tho' he does not directly ſwear the Mony paid; yet he ſays, he believes and hopes to prove it paid: But the Plaintiff not replying to him, he is excluded of the Benefit of his Proof: and this was a cunning Practice of the Plaintiff to proceed againſt thoſe Defendants only who were Ignorant of the Matter, and to exclude the Defendant who perhaps could have proved the Debt paid.

The Plaintiff was Ordered to pay Coſts, and left at Liberty to reply to the other Defendant.

In this Caſe it was admitted, that if there are three joint Factors, and a Man has a Demand againſt them jointly, a Bill againſt any one of them for the whole Duty ſhall be good; and that there are divers Precedents of it. *Sed Q.* if it be not only, where the other Factors are beyond Sea.

Thorne

Thorne verſus *Thorne.*

Caſe 133.

23 Februar. *In Court Lord Keeper.*

A Man had by Indenture mentioned to grant Enffeoffe and confirm his Land unto Truſtees to ſtand ſeized to the Uſe of his three Brothers in Conſideration of Blood, Natural Love and Affection; but it happened this Deed was never Executed with Livery. The Queſtion was, whether it ſhould work as a Covenant to ſtand ſeized: And it was decreed by the Lord *Keeper* without any Difficulty. The like Judgment was cited in the Caſe of *Croſſing* and *Scudamore*: and in the preſent Caſe, tho' it was not taken Notice of, there was an expreſs Covenant, that the *Ceſtuy que* truſt ſhould enjoy according to, and for, and during the Eſtates thereby reſpectively limited.

A Feofment without Livery to Truſtees to ſtand ſeized to the Uſe of a Brother amounts to a Covenant to ſtand ſeized.

1 Vent. 137. 2 Lev. 9. 1 Mod. 175.

In this Caſe the Settlement was with Power of Revocation, and ſubſequent to the Deed the Grantor had made a Mortgage in Fee to the Defendant, who was one of the Brothers. The Court held this to be a Revocation *pro tanto* only.

Settlement with power of Revocation. Subſequent Mortgage a Revocation *pro tanto* only. *Vid. ante Caſe* 84.

Batty verſus *Lloyd.*

Caſe 134.

Eodem die. *In Court.*

THE Defendant had agreed with the Plaintiff, who was to have an Eſtate fall to her after the Death of two old Women, to give her 350 *l.* in Conſideration of being paid 700 *l.* at the Death of the two Women, and the Plaintiff was to ſecure this 700 *l.* on a Mortgage of her Reverſionary Eſtate.

One intitled to an Eſtate after the Death of two old Lives, takes 350 *l.* to pay 700 *l.* when the Lives fall, and Mortgages the Eſtate as a Security.

It happened that both the Women died within two Years afterwards. And now the Bill was to be relieved againſt this Bargain. *Sed non allocatur*; tho' the Caſe of *Nott* and *Hill* was cited, where Relief was given in ſuch a Caſe as this; the Plaintiff in that Caſe being prevailed upon thro' his Neceſſities.

No Relief againſt this Bargain tho' both the Lives died within two Years. *Vid. poſt Caſe* 161.

Lord Keeper. I do not ſee any thing ill in this Bargain. I think the Price was the full Value, tho' it happen'd to prove well. Suppoſe theſe Women had lived twenty Years afterwards, could *Lloyd* have been relieved by any Bill here? I do not believe, you can ſhew me any ſuch Precedent. What is mention'd of the Plaintiff's Neceſſities, is, as in all other Caſes. One that is neceſſitous muſt ſell cheaper than thoſe who are not. If I had a mind to buy of a rich Man a piece of Ground that lay near mine, for my Convenience, he would ask me almoſt twice the Value: So where People are conſtrained to ſell, they muſt not look to have the fulleſt Price: As in ſome Caſes that I have known, where a young Lady that has had 10000 *l.* Portion payable after the Death of an old Man or the like, and ſhe in the mean time becomes Marriageable, this Portion has been ſold for 6000 *l.* preſent Money, and thought a good Bargain too. It's the common Caſe; pay me double Intereſt during my Life, and you ſhall have the Principal after my Deceaſe.

Caſe 135.
Eodem die.
In Court.

Norden verſus *Norden.*

A obtains a Decree for 2700 *l.* againſt *B*, who appeals to the *Houſe of Lords*, where the Decree is affirmed, and *B.* on Petition obtains an Order for a Rehearing, and immediately falling ill, makes his Will, and deviſes his Lands for Payment of his Debts.

ONE *Hollis*, that had a demand of 500 *l.* againſt *Norden*, and had run it up to 2700 *l.* obtained a Decree for it in this Court. *Norden* appealed to the *Houſe of Lords*, where the Decree was affirmed. It was obſerved that *Norden* at the pronouncing of this Decree in the *Houſe of Lords* fell down in a Swoon, and within a Week afterwards died, as ſuppoſed of Grief: But he firſt got a Petition anſwered for a Rehearing; and in his Sickneſs deviſed all his Lands for Payment of his Debts: And now *Hollis* would come within this Truſt to have Satisfaction of his Debt.

Decreed that after all the other Debts were ſatisfied, *A* ſhould be paid his Debt.

Lord Keeper. It can't be ſuppoſed that a Man who denied your Debt upon his Oath, and died your Martyr in his Cauſe, ſhould ever intend you ſhould have the Benefit of

of this Truſt. Suppoſe a Verdict had paſſed againſt a Man, and he ſhould bring an Attaint, and pending this Suit he ſhould make ſuch a Settlement for Payment of his Debts: Would any Man ſay, that he ever intended the Debt recovered by the Verdict ſhould be ſatisfied out of it? However at length he decreed, that after all Debts upon ſimple Contract were paid, *Hollis* ſhould come in and be paid his Debt, if he could find Aſſets.

Lord *Paget* verſus *Read.*

Caſe 136.

1 Martii.

In Court Lord Keeper.

SEVERAL Goods were deviſed to Mr. *Read*'s Wife for life, and after her Deceaſe to the Lord *Paget*. In this Caſe, altho' Mr. *Read* and his Wife were parted, and there had been great Suits for Alimony, and ſhe during the Separation had waſted theſe Goods: Yet the *Lord Keeper* thought it reaſonable, that the Husband ſhould be charged for this Converſion of the Feme; the Lord *Paget*'s Title being paramount the Feme, and not under her.

Husband, tho' parted from his Wife, charged in Equity with his Wife's waſting of Goods, which were deviſed to her for her Life only.

Harding verſus *Edge.*

Caſe 137.

Eodem die.

In Court.

UPON a ſpecial Report the ſole Queſtion was, how a Duty decreed ſhould take place in Relation to other Debts in point of Priority of Satisfaction; and ordered, that a Decree ſhould precede Debts on ſimple Contract and Bonds, and take place next to Judgments. And the Caſe of *Parker* and —— was cited, where it had been ſo reſolved: And as to the Objection, that in Debt upon a Bond at Law an Executor could not defend himſelf by Pleading he had no Aſſets, *ultra* what would amount to ſatisfie the Decree; it was anſwered, he might defend himſelf by a Bill in this Court, which would take care to protect him therein.

Debt by a Decree ſhall be paid after Judgments, and before Debts by Bond.

Palmer

Palmer verſus *Jones.*

Caſe 138.
Eodem die.
In Court Lord Keeper.
Truſtee not to be charged with imaginary Values, but only as a Bayliff.

THIS Cauſe coming to be Reheard, the Lord *Keeper* thought the former Decree too ſevere upon Doctor *Jones* the Truſtee; and declared he would never Charge a Truſtee with imaginary Values; but that he ſhould be Charged as a Bayliff only. He thought it a great Hardſhip, that a Truſtee was allowed nothing for his own Labour and Pains. It was Anſwered that it had often been Complained of in Court as too hard a Rule to Charge a Truſtee with what he had made, or might have made, without his wilful default; but the Court could never yet find where elſe to fix a Meaſure.

The Lord *Keeper* ſaid, that very ſupine Negligence might indeed in ſome Caſes charge a Truſtee with more than he had received, (as he remembred the Caſe of *Hollis* and *Mountague*) but then the Proof muſt be very ſtrong.

For the Plaintiff it was urged, that this Caſe had one unuſual Circumſtance, for here the Truſtee had expreſly Covenanted to ſet and let the Land, and upon other Terms would not have been admitted into the Truſt; yet for eight Years together he had kept the Land in his own hands *&c.*

After Debate the Plaintiff was glad to remit good part of what he had by the former Decree. And ſo the Matter ended by Compromiſe.

Bovey verſus *Smith.*

Caſe 139.
2 Martii.
In Court Lord Keeper.
Vid. ante Caſe 58 *&* 74.

THE Caſe was, Mrs. *Bovey* the Plaintiff's Mother living in *Holland*, and tho' a Feme Covert, yet Traded as a Feme ſole; and having acquired to herſelf a ſepa-

ſeparate Eſtate, about *forty* Years ſince made her Will in *Dutch*, and thereby Deviſed her Houſes in *Chelſea*, which ſhe had purchaſed *with her Capital*, to *William Bovey*, her Husband's Son by a former Venter, and two other Truſtees and their Heirs, in Truſt *for her four Daughters and their Children and ſuch of their Children as ſhould be alive at the laſt*; and afterwards by her ſaid Will declares the Truſt of all her Eſtate thereby undiſpoſed of to be for her and her Heirs. The Plaintiff claims as Heir to his Mother, his Elder Brother not being of the whole Blood; but by a former Venter.

Before the making of this Will Mrs. *Bovey* had ſettled theſe Houſes by Deed executed in her Life-time on the ſame Truſtees, in Truſt for ſuch Perſons and ſuch Eſtate, as ſhe by any Writing under her Hand and Seal ſhould direct and appoint.

William Bovey and the other Truſtees apprehending that this Deviſe carried the Inheritance of theſe Houſes to the Daughters, in 1652 ſell the Inheritance thereof for a full and valuable Conſideration: And the Mony is proportionably diſtributed amongſt the Daughters, the Plaintiff being privy to the Conveyance, and making no Claim, or pretending any Right to theſe Houſes, and a *Fine* is levyed of them, and *five* Years paſs. Afterwards Differences ariſing betwixt the Plaintiff and *William Bovey* the Truſtee, there is an Award made, and 200 *l.* awarded to be paid the Plaintiff, and the Plaintiff to give a general Releaſe of all Actions Real and Perſonal; but no Notice is taken in the Award of the Breach of Truſt. The 200 *l.* is paid the Plaintiff, and a general Releaſe given accordingly.

About ten Years afterwards, *William Bovey* the Truſtee for a full Conſideration purchaſes back theſe Houſes to himſelf and his Heirs; and the Defendant *Smith* ſtanding in the Place of *Bovey* the Truſtee, and the Plaintiff having now taken Advice upon this Will, and conceiving the Daughters

took only an Eſtate for Life, exhibits his Bill to have an Execution of this Truſt, and theſe Lands decreed to him.

The late *Lord Chancellor* had twice heard this Cauſe, and decreed it both times for the Plaintiff: But the Decree not being ſigned and inrolled, the Cauſe came this Day to be reheard before the *Lord Keeper*.

For the Defendant it was inſiſted, this was not only a very old and ſtale Demand, (the pretended Breach of Truſt having been committed above thirty Years ſince) But a very hard Demand in Equity, to charge a Truſtee, who according to the beſt of his Skill had in this Caſe acted honeſtly; and to evict the Land from him, who was now become a real and innocent Purchaſor thereof.

And *firſt*, as to the Will itſelf, it was obſerved, that the ſame was made in *Dutch*, and the Original was loſt, and a ſmall Miſtake in the Tranſlation might make a great Variance in it; for if it had been *Iſſue* inſtead of *Children* it would have carried an Eſtate Tail; and the Cuſtom in *Holland* may be, that thoſe Words carry an Inheritance there: And the Will being in truth incoherent, and almoſt inſenſible in it ſelf, if the Matter had been called in Queſtion within any reaſonable time, the Intent of the Teſtator might have been made out by Proof, which might have given light to the doubtful and ambiguous wording of the Will, and by which the Intent of the Teſtatrix might have better appeared: But here has been an Acquieſcence in the Plaintiff for above *thirty* Years: Whereas had he ſoon laid Claim to this Eſtate, the Defendant might in Equity have compelled the Daughters to have refunded the Money received by them out of this Eſtate.

Secondly, It was inſiſted, that the Fine with Proclamations and non Claim for five Years was a flat Bar to the Plaintiff in this Caſe; and cited Caſes, wherein it had been

been reſolved, that no other Claim than the exhibiting a Bill, and taking out a Subpæna was a ſufficient Claim in Equity; as a Man at Law muſt file an Original, where he cannot enter.

Thirdly, That the Releaſe being general of all Actions real and perſonal, it releaſed the Breach of Truſt, if any were; and it being full within the Words of the Releaſe; after ſo many Years it ought not now to be enquired into, whether this Breach of Truſt was intended to have been releaſed thereby.

Fourthly, If there was any Notice of the Truſt in this Caſe, it was at moſt but a Notional Notice; for both the Plaintiff and the Truſtee apprehended, that this Will carried the Inheritance to the Daughters.

Fifthly, It was obſerved, that this was a Declaration of a Truſt only, and not the Limitation of an Eſtate; and that therefore there was a greater Latitude left to the Court in judging upon this Caſe; and that in many Reſpects it ought to have an equitable and favourable Conſtruction.

For the Plaintiff it was anſwered, that tho' the Will was in *Dutch*, and tho' it might be ſuch as by the Law of the *Low Countries* would carry an Inheritance; (tho' what the Cuſtom of the *Low Countries* is, does not appear) yet that is nothing to the purpoſe; for a Will to paſs the Inheritance of Lands in *England*, whereſoever it is made, muſt be ſuch, as will carry an Inheritance according to the Laws of this Realm; as has been reſolved in Caſe of *Latin* Wills, and the like. And the Deviſe being concerning Lands, the whole Will muſt be in Writing, and the Intent of the Teſtator cannot be ſupplied by Proof. And as to the Plaintiff's Acquieſcence under this Breach of Truſt, it is eaſily anſwered; for the laſt of the Daughters died not above two Years before the Bill exhibited; and tho' the Re-

Remainder Man may, if he will, take advantage of the Forfeiture of the Tenant for Life preſently; yet he is not bound to do it; but ſhall have five Years after the Death of the Tenant for Life to make his Entry or Claim. And the Plaintiff's Bill in this Caſe is very proper to have the Land it ſelf decreed, for tho' the Plaintiff may have Satisfaction in Damages, yet the Land being now come to the Truſtee again, the beſt and equaleſt meaſure is to decree him to convey the Land it ſelf: And they cited the Lord *Canmore*'s Caſe, where a Truſt was broken, and then a full Bar to the *ceſtuy que* truſt, and yet the Land coming afterwards into the Truſtee's hands, he was decreed to convey the Land it ſelf, as the beſt meaſure that could be taken in that Caſe. And the Plaintiff's Council did inſiſt, that there was not any Bar at all to the Truſt, as this Caſe was: For *firſt*, as to the Releaſe, a Releaſe ſhall never bar a Man, who is ignorant of the Right and Intereſt he is to releaſe, and where ſuch Right is ſuppreſt and concealed from him: And in this Caſe the Plaintiff was not appriſed, that any thing paſſed to him by this Will.

Secondly, Tho' the Releaſe be general of all Actions real and perſonal, yet it was made in purſuance of an Award, which concerned Matters in Account between the *ceſtuy que* truſt and the Truſtee only: And it is not, nor can be pretended in this Caſe, that the Plaintiff hath received any Satisfaction for his Intereſt in theſe Houſes.

Thirdly, All the three Truſtees joined in the Conveyance, and ſo were all guilty of a breach of Truſt; and yet this Releaſe is made to one of them only; whereas if it had been deſigned to have releaſed the breach of Truſt, it would have been made to them all.

Then as to the Fine, it's true a Fine will bar an equitable Right, as well as an Eſtate at Law; but then the Eſtate muſt be diſplaced, which here it is not; the Fine being by and between the Parties to the Truſt only, who having

Notice of the Truſt, the Fine Operates ſo, as to ſtrengthen the Truſt, and not to extinguiſh it; the Truſt being all along incumbent on the Land, and Paſſing with it: and ſo this Caſe is in truth ſtronger than that Caſe of the Lord *Canmore*, for here was never any real Bar: And in this Caſe it was impoſſible any one ſhould come at the Land, but they muſt have Notice of the Truſt; for they Purchaſe under the Will, and all their Title is by the Will, by which the Truſt is created: and a Man that has Notice of the Will muſt at his Peril take Notice of the Operation and Conſtruction of the Law upon it; and tho' this be called a notional Notice, yet it is ſuch a Notice, as has always been allowed to be good; for every Man is preſumed to be conuſant of the Law of the Realm, and he ſhall not take Advantage of his own Ignorance, but *Caveat Emptor.*

For the Defendant it was only replyed, that here was no Anſwer given, as to the Plaintiff's Acquieſcence, and coming ſo late; for there was no Survivorſhip in the Caſe; for the Jointure was ſevered by the Fine, and all but one of the four Daughters dead almoſt ten Years before the Bill.

The *Lord Keeper* in the Debate put this Caſe to *Serjeant Maynard*. *A* ſeized in Fee in Truſt for *B*, for full Conſideration conveys to *C*, the Purchaſor having Notice of the Truſt; and afterwards *C*, to ſtrengthen his own Eſtate, levies a Fine. Whether *B* the *Ceſtuy que* truſt be not in that Caſe bound to enter within *five* Years? and the Council were all of Opinion, that he was not: for here *C* having Purchaſed with Notice, notwithſtanding any Conſideration paid by him, is but a Truſtee for *B*; and ſo the Eſtate not being diſplaced, the Fine cannot bar.

Lord Keeper. In this Caſe you come here in Equity, after one and thirty Years Poſſeſſion to affect an Eſtate with a Truſt, notwithſtanding a Releaſe and Fine, and that upon a Suppoſal that Mrs. *Bovey* made no other Appointment

(as ſhe had Power to do by the Deed) and after ſo long a Poſſeſſion it ought rather to be Preſumed ſhe did: and alſo upon a Suppoſal, that this is a true Copy of the Will. This is only a Tranſlation, and the Original loſt, and the difference in point of Tranſlation betwixt Children and Iſſue is nice, and the Queſtion is, who ſhall ſuffer; for the Defendant is a Purchaſor and has paid a full Conſideration, and here muſt be affected with a notional Notice only; and the Plaintiff all the while ſtood by, and was ſilent, and at beſt was Paſſive in the breach of Truſt: and this Caſe is rather ſtronger than Sir *George Norton's* Caſe, where the Heir ſtands by, and incourages a Purchaſor, and afterwards trumps up a Deed of Entail. Tho' it be hard to Diſmiſs the Bill after two Decrees for the Plaintiff, yet I am not ſatisfied I can Decree it for him.

Ante Caſe 128.

The Bill muſt ſtand diſmiſſed.

Caſe 140.
Eodem die.
In Court Lord Keeper.

Roberts & al' verſus *Matthews & al'.*

Scrivener puts out Mony on Bond, and receives the Intereſt from time to time, and then receives part of the Principal, the Bond remaining in the Obligee's Cuſtody.

THE Caſe was, the Defendant *Matthews* imployed one *Smith* a Scrivener to place out 50 *l.* for him at Intereſt, which the Scrivener did to the Plaintiff, and took the Plaintiff's Bond for it in the Defendant's Name; and about three Months afterwards delivered the Bond to the Defendant. Plaintiff *Roberts* all along paid his Intereſt to the Scrivener, and about five Years after the Entering into this Bond the Scrivener calling upon him for the Principal, he paid 30 *l.* of it, and the Scrivener not having the Bond in his Cuſtody, gave the Plaintiff a Receipt for 30 *l.* received in part for the Uſe of the Defendant *Matthews*.

No good Payment.

Adjudged this was a void Payment; for the Bond being in the Cuſtody of the Defendant *Matthews*, and not in the Scrivener's, the Plaintiff ought to have ſeen his Mony indorſed on the Bond: And tho' this alone were enough

to

to make it an ill Payment, yet this Caſe was the ſtronger; for that the Plaintiff was not ignorant whoſe Money it was; the Receipt he took for the Payment of the 30 *l.* being for the uſe of the Defendant. And many Precedents were cited to the ſame Purpoſe.

Caſe 141.

Eodem die.

In Court Lord Keeper.

Hollis verſus *Whiteing.*

Bill for an Execution of a Parol Agreement for a Leaſe of a Houſe to Plaintiff, who in Confidence of the Agreement had laid out Money.

THE Bill was to have the Execution of a Parol Agreement for a Leaſe of a Houſe, ſetting forth that in confidence of this Agreement the Plaintiff had laid out and expended very conſiderable Sums of Money, *&c.*

Defendant pleaded the Statute of Frauds, *&c.* Plea allowed. *Vid. poſt Caſe* 148.

The Defendant pleaded the Statute of *Frauds* and *Perjuries*, and the Plea was allowed. But the *Lord Keeper* was of Opinion, that if the Plaintiff had laid in his Bill, that it was part of the Agreement, that the Agreement ſhould be put into Writing, it would alter the Caſe, and poſſibly require an Anſwer.

If it had been laid to be part of the Agreement, that the Agreement ſhould be put in Writing, whether Defendant muſt not have anſwered.

DE
Termino Paſchæ,
35 *Car' II.* 1683.
In Curia Cancellariæ.

Alderman Backwell's Caſe.

Caſe 142.
16 Aprilis.
In Court Lord Keeper.
2 Ch. Rep. 190.

Granting a Commiſſion of Bankruptcy is not diſcretionary but *de Jure*

SEVERAL of the Creditors of *Alderman Backwell* having this Vacation petitioned for a Commiſſion of Bankruptcy againſt him, the Lord *Keeper* Ordered that a Commiſſion ſhould Iſſue, unleſs Cauſe were this Day ſhown to the Contrary. And it was now Moved that the granting of the Commiſſion might for ſome time be Suſpended, for that much the Major Part of the *Alderman's* Creditors had Compounded with him, which would be all ſet aſide and avoided, if a Commiſſion ſhould go; and it was ſought for only by ſome few and Unreaſonable People; the *Alderman* having already made very fair Propoſals, *viz.* that the Creditors ſhould be paid their whole Debts, One *fifth* in ready Mony, and the other four *fifths* in Aſſignments on the *Exchequer*; and that near two hundred and fifty of his Creditors had accepted of this Compoſition, and actually received their Moneys, which now would be all over-reached by this Commiſſion: and they did not doubt, but in a Month's time, if the Commiſſion might be ſo long Suſpended, they ſhould agree with the reſt of the Creditors.

But by the Council for the *Creditors* it was anſwered, that by the *Alderman*'s petitioning for Time and other ſtudied Delays, and by reaſon of Privilege coming in, he had already for near ſeven Years prevented the Creditors of the Benefit of this Commiſſion already; and that their Danger was very great in theſe Delays; for by the Statute a Purchaſor was not to be over-reached unleſs the Commiſſion was Sued out within five Years after his Purchaſe, and they did not know but that this might be a critical time for the granting of the Commiſſion in that reſpect: And by the very Words of the Statute no Commiſſion of Bankruptcy can iſſue after a Man's Death; and tho' it was granted in a Man's Life-time, yet if nothing was done upon it before he dies, all is avoided.

Lord Keeper declared, that tho' the Words in the Act of Parliament were, that the *Chancellor* may grant a Commiſſion of Bankrupt, yet that (*may*) was in Effect (*muſt*), and it had been ſo reſolved by all the Judges. And the granting of a Commiſſion was not a Matter diſcretionary in him, but that he was bound to do it: And that he had done the *Alderman* already what Kindneſs he could, in that he refuſed to grant a private Seal for the paſſing of this Commiſſion; but that now he could deny it no longer, by reaſon of the Prejudice and Hazard that the Creditors might in this Caſe ſuſtain by Delays. And as for what was ſaid, that much the greater part of the Creditors had already ſubmitted to a Compoſition, and had delivered up their Specialties, and now this Commiſſion would over-reach them, and they would be in danger to loſe their Debts; he ſaid, he could not help that, if it ſhould ſo fall out: But as for Bills of Conformity they had been long ſince exploded, and there was no ſuch Equity now in this Court: But he would take care, that there ſhould be able Perſons nominated Commiſſioners; and therefore firſt, to prevent all Danger, he directed the Commiſſion ſhould be this Day Sealed, and that the Commiſſioners ſhould meet, and proceed to prove the *Alderman* a Bankrupt, ſo that the

Execution of the Commiſſion might not be prevented by his Death; and that then they ſhould ſurceaſe all further Proſecution: And directed Alderman *Backwell*'s Council to bring him the Names of ſuch ſufficient and honeſt Perſons, as might be fit to be Commiſſioners in this Caſe, and ſuch as might treat with the Creditors, and ſee if they could come to any Agreement; and he would renew the Commiſſion to ſuch Perſons: And ſaid, it was a Miſchief, that the Act of Parliament had ſubjected the Commiſſioners to an Action, ſo that no ſufficient Perſons, and ſuch as might be fit to manage ſuch a Concern as this, would undertake the trouble of it. And as for a Debt of 60000*l.* that Mr. *Attorney* ſaid the *Alderman* owed the *King*, the *Lord Keeper* ſaid, if ſuch a Debt was owing, it was fit Application ſhould be made to the *Lords* of the *Treaſury*, that his *Majeſty* ſhould be ſatisfied out of the Aſſignments of the Exchequer Debt; but ſaid, there was a Patent now lay before him, which he was much importuned to paſs, whereby this Debt of the King's was to be fixt upon the Land, and the King to grant this to the Alderman's Son.

Vid. poſt Caſe 205.

Caſe 143.

Eodem die.

In Court Lord Keeper.

Vid. ante Caſe 102.

Anonimus.

UPON a Motion for a Meſſenger upon a *Cepi Corpus* returned in *London*: The *Lord Keeper* ſaid, that now the granting of a Meſſenger in ſuch a Caſe was become the ordinary Proceſs of the Court, and it might be neceſſary for Expedition; but he muſt take Care that the King might not loſe his Amerceaments, and therefore for the future no Meſſenger ſhould go till the Sheriff was amerced: But it was anſwered, that would occaſion great Delay, for that the Sheriff could not be amerced, but in Term time.

Anonimus.

Anonimus.

Case 144.

Eodem die.

In Court Lord Keeper.

Motion, that a Lunatick, who had recovered his Underſtanding, might be inſpected and make a Settlement of his Eſtate.

A Motion was made that a Man, who was found to be a Lunatick, being now by his Confinement become of ſound Mind, might be inſpected, and might make a Settlement of his Eſtate. But the *Lord Keeper* refuſed to make any Order in it; but directed them, that if he made any Settlement of his Eſtate, the ſame ſhould be done before the *Juſtice of the Common Pleas* by Fine, that ſo they might examine him, and inſpect him. And directed, that for as much as now he was found a Lunatick on Record, they ſhould reply to it, that he was now reſtored to his Underſtanding; that ſo Iſſue might be taken upon it and try'd in the *Common Pleas*.

The Caſe of the Town of Nottingham.

Case 145.

27 Aprilis.

In Court Lord Keeper.

Scire facias to repeal a new Charter, after Surrender of the old one, returned by the old Sheriffs. If it ſhall be received.

THE Corporation being divided into Parties, one Party ſurrendred the old Charter, and took a new one; the other Party would ſtand and fall by their old Charter, and brought a *Scire fac.* to repeal this new Charter, upon which the old Sheriffs returned *Scire feci*, and the Return was filed.

And now it was moved by Mr. *Attorney General*, that this Return might not be received, for that were to admit that the old Charter was in being, contrary to the Surrender and new Charter, which were both remaining on Record in this Court.

But it was anſwered, that the Objection of Prejudice was equal on both Sides; but with this, that it was impoſſible this Retorne ſhould be made by the new Sheriffs, for they are Defendants, and they cannot retorne, they had ſerved themſelves: And Mr. *Attorney* has admitted, that

that the old Sheriffs are the Sheriffs in Poſſeſſion, by his bringing a *Quo Warranto* againſt them: And this being purely a Queſtion of Right, and the Retorne that is to be made being only whether they had Notice or not; they cannot be injured by it: If they have not legal Notice they may plead it, and it will that way avail them. And now they move too late, this Retorne being already regularly fil'd in Court, and to damn it now, were to determine the Merits of the Cauſe upon this Motion.

The *Lord Keeper* was of Opinion, that the Court in ſuch a Caſe as this ought not to interpoſe; but gave Mr. *Attorney General* a Fortnight's time to ſpeak to it; but ſaid, whereas the King has a *Quo Warranto* depending againſt them, if the Parties, who were againſt the new Charter, meant to out-run the King's Action, he thought that ought not to be ſuffered; and it was a ſtrange Proceeding and without Precedent, that was uſed in the Duke of *Buckingham*'s Caſe, *viz.* pending the King's Suit to convict his Witneſſes of Conſpiracy.

Caſe 146.

Eodem die.

In Court.

The Lady *Poines*'s Caſe.

No Injunction to quiet Poſſeſſion, but where the Party has been in Poſſeſſion *three* Years before filing his Bill, or where the Cauſe has been heard, and the Merits determined.

THE Lady *Poines*'s Truſtee having Contracted to ſell her Eſtate to one Perſon, and ſhe herſelf having actually ſold it to another, this Truſtee diſturbed the Purchaſor in his Poſſeſſion; and it was now moved for an Injunction to quiet the Poſſeſſion of the Purchaſor. But it was anſwered, that ſuch a Motion never was made to have an Injunction to quiet the Poſſeſſion for a Defendant, who had no Bill in Court, and that before the Cauſe was heard. An Injunction for quieting the Poſſeſſion is only grantable where the Plaintiff has been in Poſſeſſion for the Space of *three* Years before the Bill exhibited, upon a Title yet undetermined, or in Caſe the Cauſe hath been heard, and Judgment paſſed upon the Merits of the Cauſe by the Court. And therefore the *Lord Keeper* denied the Motion.

Browne

Brown verſus *Brown.*

Caſe 147.
30 Aprilis.
In Court Lord Keeper.
2 Ch. Rep. 140.

Award made in purſuance of a Rule of Court, at a Tryal in an Action of Waſte, againſt Tenant for Life for not repairing, and 380 *l.* awarded, and tho' the Party had made good the Repairs within 40 *s.* before the Award made, yet no Relief.

SIR *Anthony Brown* being Tenant for Life, Remainder to his firſt and other Sons in Tail, Remainder in Tail to the Defendant of ſome Mills and Houſes of about 70 *l.* *per Ann.* and having no Iſſue, ſuffered the Mills and Houſes to go greatly out of Repair; and it was computed that the Reparations would amount unto 380 *l.* or thereabouts; hereupon *Brown*, the Remainder Man, brings an Action of Waſte at Law. When the Cauſe came to be tryed at the *Aſſizes*, there was a Propoſition made for a Reference to Arbitrators and Umpire, and accepted by the Parties, and by Conſent it was made a Rule of Court. Afterwards and before the Award made, Sir *Anthony Brown* repairs all the Waſte within forty Shillings, and forbids the Arbitrators to make any Award, who thereupon forbore, and likewiſe forbid the Umpire; but he, notwithſtanding, made his Award, that Sir *Anthony Brown* ſhould pay the Defendant 380 *l.*

The Plaintiff's Bill was to be relieved againſt this Award; and for the Plaintiff it was inſiſted, that it was a bold thing of an Arbitrator or Umpire to make an Award, after he had been forbid by the Party; and they ſaid it was a Rule here, that no Award ſhould ſtand, where the Arbitrator or Umpire refuſed to hear the Party; and they endeavour'd to make it out, that the Umpire had ſo done in this Caſe; but their Proof amounted to no more, than that the Umpire had ſaid, he was ſo well ſatisfied, as to the Value of the Repairs, that the Plaintiff might bring what Witneſſes he would, he ſhould not believe them, he having viewed the Repairs himſelf. Then they inſiſted that the Damages in this Caſe were very outragious, the Repairs being made good within 40 *s.* before the Award made: And the Umpire being a Carpenter, they compared it to the Butcher of *Craydon*'s Caſe, who had awarded a

Man, that had been called *a Bankrupt Knave*, 300 *l.* to repair his Honour, as he expreſſed it in his Award. And it was ſaid that in this Caſe the Defendant had but a remote Remainder after an Eſtate Tail, and yet he had as much Damages given him, as if he were to come immediately into the Eſtate.

For the Defendant it was inſiſted, that this was an Award made in Purſuance of a Rule of Court, and the whole Matter had been examined in the *Common Pleas*, and when they were at the Wall there, and under an Attachment for not performing of the Award, then they come with a Bill here, and get an Injunction; whereas it is not uſual to ſtay Proceedings on an Attachment in another Court: And that here was no Fraud or Colluſion in the making of this Award, and *that* is neceſſary to the avoiding of it in Equity. And they conceived the Damages were not outragious, for the Umpire might have given the treble Value. And as to the Objection, that the Defendant had only a remote Remainder after an Eſtate Tail, it was anſwered by Serjeant *Maynard*, that the Damages were not to be conſidered in Proportion to the Man's Eſtate, who is to have them, but proportionable to the Damage done the Inheritance: And he ſaid if Awards muſt be ſet aſide on ſuch ſlight Pretences, they had as good ſtrike that Title out of the Books; and he cited the Caſe of *Robins* and *Grantham*, where there was a plain Miſtake of 250 *l.* and yet the Party could not get any Relief againſt the Award. And the Caſe of *Crab* and *Fenton*.

After long Debate the *Lord Keeper* diſmiſſed the Bill, ſaying, he ſaw no Fraud or Colluſion in the Matter, and the Damages were not outragious: he might have awarded the treble Value, altho' it's true, as was Objected by the Plaintiff's Council, 380 *l.* is near the Value of an Eſtate for Life of 70 *l. per Ann.* He ſaid, where there appears a manifeſt Error in the Body of an Award, there in ſome Caſes there may be Relief againſt it in *Chancery*; but where

the Error does not appear without unravelling of it, and examination to matters of Account, he thought it was not relieveable here.

Note, In this Caſe the Umpire himſelf, tho' excepted to, was read as a Witneſs.

Hollis verſus *Edwards*, & *al'*.

Caſe 148.

Deane verſus *Izard*.

1 Maij.
In Court.
Lord Keeper.

IN theſe Caſes, Bills were exhibited to have an Execution of Parol Agreements touching Leaſes of Houſes, and ſet forth, that in Confidence of theſe Agreements the Plaintiffs had expended great Sums of Money in and about the Premiſſes, and had laid the Agreement to be, that it was agreed, the Agreements ſhould be reduced into Writing. The Defendants pleaded the Statute of *Frauds* and *Perjuries*.

Vid. ante Caſe 141.

For the Plaintiffs it was inſiſted on the Saving in the Act of Parliament, *viz.* Unleſs the Agreement were to be perform'd within the ſpace of a Year: But it was anſwered, *that* Clauſe did not extend to any Agreement concerning Lands or Tenements. Then it was inſiſted for the Plaintiffs, that undoubtedly they had a clear Equity to be reſtored to the Conſideration they had paid, and to the Mony which they in Confidence of the Agreement had expended on the Premiſſes.

As touching that Matter, it was ſaid by the *Lord Keeper*, that there was a Difference to be taken, where the Mony was laid out for neceſſary Repairs or laſting Improvements, and where it was laid out for Fancy or Humour; and that he thought clearly the Bill would hold ſo far, as to be reſtored

ſtored to the Conſideration: But he ſaid, the Difficulty that aroſe upon the Act of Parliament in this Caſe was, that the Act makes void the Eſtate, but does not ſay the Agreement it ſelf ſhall be void; and therefore, tho' the Eſtate it ſelf is void, yet poſſibly the Agreement may ſubſiſt; ſo that a Man may recover Damages at Law for the non-Performance of it; and if ſo, he ſhould not doubt to decree it in Equity: And therefore directed, that the Plaintiffs ſhould declare at Law upon the Agreement, and the Defendants were to admit it, ſo as to bring that Point for Judgment at Law; and then he would conſider, what was further to be done in this Caſe.

Caſe 149.

Eodem die.

In Court Lord Keeper.

2 Ch. Rep. 104.

Lady Dacres verſus *Chute.*

Sequeſtrators having by vertue of an Order Power to fell Timber, they fell Timber to the Value of 7000*l.* and pay over but 2000*l.* to the Plaintiff for whoſe benefit the Sequeſtration was taken out.

THE Lady *Dacres* by Agreement made on her Marriage with the Defendant's Grandfather was to have a Jointure of 500*l. per Ann.* or 5000*l.* in Mony. She elected the 5000*l.* in Mony, and had a Decree for it, and a Sequeſtration of the Defendant's Lands, and a Writ of Aſſiſtance to put her in poſſeſſion, and a Decree was made againſt the Defendant, then an Infant, for Maintenance to be allowed his younger Brothers and Siſters; and this was to be paid out of the ſequeſtered Eſtate.

Plaintiff not chargeable with more than the 2000*l.*

Upon an Appeal the *Houſe* of *Lords* reverſe this Decree as to the Maintenance, which had been paid to the Lady *Dacres*, and which ſhe had applied for the Maintenance of the Children: and now the Cauſe came back to the Court to have the Account taken of what the Lady, her Agents, or any under her, had received out of this Eſtate. The Lord *Keeper* upon the Account allowed the principal Sums paid for Maintenance towards the ſinking of the Lady *Dacres*'s Debt, but would not let them be applied at the time they were paid; but in one intire Sum at the end of the Account; and ſo ſtruck off all the Intereſt for above ſixteen Years, which came to more than the Prin-

Principal; ſaying, that this was a hard Caſe, and Damages were in the Power of the Court.

In this Caſe the Sequeſtrators had Power by Order of the Court to fall Timber; and it appeared by Proof in the Cauſe, that the real Value of the Timber taken by them off this Eſtate amounted unto 7000 *l.* and but 2000 *l.* had been brought to Account. And for as much as it did not appear that the Lady *Dacres* had received more then 2000 *l.* on account of the Timber, the *Lord Keeper* would not charge her further, ſaying, the Sequeſtrators were the Officers and Agents of the Court, and Men muſt take care to pay their Debts at their Peril: tho' the Defendant was all this time an Infant.

Twiſden verſus *Wiſe.*

Caſe 150.

4 Maij. *In Conrt Lord Keeper.*

Money in Truſtees Hands for a Feme Covert, ſhall go to the Feme, if ſhe ſurvives the Baron, and not to his Executors.

MOneys were left in Truſtees Hands for the Benefit of a Feme Covert, and the Husband dyes. The Queſtion was, whether the Wife or the Executor of the Husband ſhould have it; and decreed for the Wife, the Husband having made no particular diſpoſition of it.

Alam verſus *Jourdan.*

Caſe 151.

THERE being but one Witneſs againſt the Defendant's Anſwer, the Plaintiff could have no Decree.

Company of Pewterers verſus *Governour of* Chriſt's Hoſpital.

Caſe 152.

Eodem die.

A Deviſe to a Man and the Heirs of his Body, and if he ſhall go about to alien, his Eſtate ſhall

A Man deviſes Land to one and the Heirs of his Body, but if he ſhould go about to alien, that then his Eſtate ſhould ceaſe, and from and after the Determination

ceaſe, and the Lands go over to a Charity. The Deviſe over is void, it tending to create a Perpetuity.

of his Eſtate, then he Deviſed the Lands to *Chriſt's Hoſpital.*

The Queſtion was, if the Limitation to *Chriſt's Hoſpital* was good.

It was admitted, that this Reſtraint of Alienation tended to a Perpetuity, and was therefore void; but the Fact being, that the Eſtate tail was ſpent by Effluction, and the Donee being now dead without Iſſue, the Charity ought to take place, and the Limitation was good.

But the *Lord Keeper* decreed againſt the Charity, and ſaid that this was an Invention taken up about the time, that this Will was made, to create a Perpetuity; thinking that by limiting an Eſtate over to a Charity, the Law would be ſo careful to preſerve the Charity, that it would allow of ſuch a Limitation, and admit, that Advantage might be taken of a Forfeiture in the Caſe of a Charity, which it would not do in the Caſe of a private Perſon: And the Intention of the Teſtators plainly appearing to be to create a Perpetuity, the Limitation was adjudged void.

Caſe 153.

Anonimus.

Legatees paid before Creditors where the Aſſets fell ſhort, decreed to refund to an unſatisfied Creditor.

A Being indebted unto *B*, makes *C* his Executor. *C* waſtes the Eſtate, and dies, and makes *D* his Executor, and by his Will Deviſes ſeveral Legacies. *D* pays the Legacies. *B* exhibits a Bill againſt *D*, the Executor of *C*, for his Debt due from the firſt Teſtator, and againſt the Legatees in the Will of *C*, to compel them to refund their Legacies, there not being now ſufficient Aſſets of the firſt Teſtator.

Decreed that the Legatees ſhould refund.

Duke

Duke of *Norfolk* verſus *Howard.*

Caſe 154.
15 Maij.
In Court Lord Keeper.

THE Matter now coming on to be argued on a Bill of Review to reverſe the Decree made in this Cauſe by the late *Lord Chancellor*, Errors aſſigned upon a Demurrer were, *Firſt*, that it does not appear there was an Attornement to him that made the Settlement. *Secondly*, That the now Plaintiff ought not to be accountable for the Profits longer than he received the ſame. *Thirdly*, That at the pronouncing of the ſaid Decree the *Chancellor* was aſſiſted with *three* Judges, who were of Opinion againſt the Decree. *Fourthly*, That the Limitation of the Term over unto the Defendant *Charles Howard* was void. But the only Error inſiſted on was the fourth, *viz.* that the Limitation of the Term over was void.

The *Lord Keeper* ſaid, that at the time of the pronouncing the former Decree, his Opinion was againſt the Decree, and that he had conſidered of it ſince, and could not find any Reaſon to alter his Opinion; and therefore told them plainly, that this Cauſe came before him with ſome Prejudice, unleſs they could by new Matter or new Reaſons convince him; and therefore did propoſe, that the Plaintiff ſhould admit the Truſt of the Term to be an Eſtate at Law executed to the ſame Uſes, and that they ſhould try their Title in an Ejectment at Law; but the Defendant's Council declined it, and inſiſted their Caſe was much ſtronger in Equity than it was at Law; and they relyed much upon the Truſt of a Term to be different from the Limitation of a Term at Law.

The Plaintiff's Council argued much to the ſame Effect as formerly, and relyed upon the Caſe of *Child* and *Bailey*, and *Burges* and *Burges*. 2 Gr. 459. Pol. 40.

The

The Lord *Keeper* declared he ſaw no reaſon to change his former Opinion. He ſaid the late Lord Chancellor declared upon the hearing of this Cauſe, that the Truſt of a Term was to be governed by the ſame Rules, as the Limitation or Deviſe of a Term at Law was, and therefore thought he was unreaſonably preſſed by the Defendant's Council, who inſiſted on the Equity of the Caſe, and would make a difference between the Limitation of the Truſt of a Term, and a Deviſe of a Term or Limitation of a Term it ſelf. A Perpetuity is a thing odious in Law, and deſtructive to the Commonwealth: it would put a Stop to Commerce, and prevent the Circulation of the Riches of the Kingdom; and therefore is not to be countenanced in Equity. If in Equity you ſhould come nearer to a Perpetuity, than the Rules of common Law would admit, all Men, being deſirous to continue their Eſtates in their Families, would ſettle their Eſtates by way of Truſt; which might indeed make well for the Juriſdiction of the Court, but would be deſtructive to the Commonwealth. And the Intention of a Man is not always to be purſued in Equity: as in the Caſe put by Mr. Serjeant *Maynard*. If a Man ſettles a Term in Truſt for one and his Heirs, it ſhall go to the Executor. And he remembred, at the laſt hearing, it was ſaid that my Lord *Bridgeman* directed this Conveyance, and his Name was urged to give an Authority to the Caſe: But he ſaid, this Conveyance, whoever drew it, was certainly a very inartificial Conveyance; for *Firſt*, If the words, Heirs males, had been left out, it would have been good. *Secondly*, If there had been a new Term created, it would have been good. *Thirdly*, As this Term is limited, if the Honour of *Graiſlock* had not deſcended to the preſent *Duke* himſelf, but to his Iſſue, then this Proviſion for the Defendant had been out of doors. *Fourthly*, The Limitation to all the ſeveral Sons in Tail, the one after the other, was certainly inartificial; and ſaid it was an hard Caſe: But the Rules of Law muſt be obſerved: and ordered the former Decree to be reverſed.

Truſt of a Term governed by the ſame Rules in Equity, as the Limitation of the legal Eſtate of a Term is at Law.

Perpetuities odious. *Vid. ante Caſe* 152.

Note, This Decree was reverſed in the Houſe of Lords the 19 *June* 1685, and the former Decree of the Lord *Nottingham* affirmed.

Treackle

Treackle and *Coke.*

Caſe 155.
Eodem die.
Lord Keeper.

Aſſignee of a Leaſe rendring Rent aſſigns over, he ſhall be liable in Equity for the Rent during the time he enjoyed the Land.

THE Aſſignee of a Leaſe rendring Rent, having enjoyed the Land Six Years, aſſigns over. The Bill was to call him to an accompt for the Rent for ſuch time as he enjoyed the Land; the Defendant pleaded a Judgement upon a Demurrer at Law; and the Plea was over-ruled: for tho' in ſtrictneſs of Law there is no Privity of Contract to charge the Aſſignee, yet in Equity he is moſt certainly chargeable for ſuch time, as he received the Profits.

The Council alledged, there were Twenty Precedents in the Caſe; and the Lord *Keeper* ſaid, if there had not been one, he ſhould not have doubted to have made a Precedent in this Caſe.

Aſhton verſus *Aſhton.*

Caſe 156.
Eodem die.

A Witneſs cannot demur, becauſe the Queſtions asked him are not pertinent to the Matter in Iſſue.

A Bill being exhibited to prove a Will, and perpetuate the Teſtimony of the Witneſſes, the Defendant upon Croſs Examination of one of the Witneſſes exhibited an Interrogatory to him, to diſcover what Deeds or Settlements he knew the Teſtator had made; To which the Witneſs demurred, as not pertinent to the Matter in Iſſue.

The Lord *Keeper* over-ruled the Demurrer, becauſe he would not introduce ſuch a Precedent, as for a Witneſs to demur: it did not concern the Witneſs to examine what was the Point in Iſſue.

Caſe 157. ***Univerſity Colledge in Oxon*** verſus ***Foxcroft.***

Eodem die.

If a Sequeſtration for a Perſonal Duty may be revived againſt the Heir.

UPON a Demurrer the Lord *Keeper* inclined, that a Sequeſtration for a Perſonal Duty determined with the Death of the Party, and could not be revived againſt the Heir; but took time to conſider of it, and would be attended with Precedents; and the Caſe of *Rockley* and *Burdett* was cited, where it was ruled, that ſuch a Sequeſtration ſhould not bind the Feme, who came in for her Jointure or Dower.

Vid. ante Caſe 106.

Caſe 158. ***Melliſh*** verſus ***Williams.***

Eodem die.

Ante Caſe 103.

Upon a Bill of Review the Party cannot aſſign for Error, that any of the Matters decreed are contrary to the Proofs in the Cauſe.

WILLIAMS in his Bill of Review aſſigned for Error the ſubject Matter of fourteen Exceptions to the Maſter's Report, which had been formerly over-ruled; and the Defendant demurred, for that there was no Error appearing in the body of the Decree.

The Plaintiff's Council inſiſted, that theſe matters being contrary to the Proofs in the Cauſe, tho' they were matters of fact, they might be examined in a Bill of Review upon the Proofs already taken; for the Rule of the Court is, that there muſt be Error appearing in the body of the Decree without further examination of matters of Fact; which implies, that if it can be done without farther Proof, a Decree may be reverſed for Errors which may be made out by Proofs already taken in the Cauſe: But that was utterly denied by the Defendant's Council and the Court: for that only Errors in Law could be aſſigned; or new Matter diſcovered ſince the Decree made, and that with leave of the Court.

But muſt ſhew ſome Error appearing in the Body of the Decree, or new Matter diſcovered ſince the Decree.

Popham

Popham verſus *Bamfeild.*

Caſe 159.
18 Maij.
In Court Lord Keeper.

THIS Cauſe came on to be reheard; but the *Lord Keeper* did not vary the former Decree. He ſaid, the Difference was, whether this Caſe lay in Compenſation or not: For where there can be a Recompence made, this Court will relieve againſt ſuch a Condition: And therefore directed a Maſter to look into it, and ſee what Recompence Mr. *Popham* had made his Son by his Will: And declared, if a Compenſation was made, he would relieve againſt the Breach of the Condition: But in caſe a ſufficient Compenſation was not made, he would then conſider farther of it.

Ante Caſe 73.

Vermuden verſus *Read.*

Caſe 160.
Eodem die.
In Court Lord Keeper.

THIS Caſe being likewiſe reheard, the *Lord Keeper* thought not fit to aid the Complainant, or to make a better Caſe for him in Equity than he had at Law upon the Articles; but thus far only, that whereas Sir *Compton Read* by the Articles had a Power to retain the 4000 *l.* at 3 *l. per Cent.* Intereſt, his Lordſhip decreed, that Sir *Compton* ſhould either pay the Mony, or that the Complainant ſhould hold the Land abſolutely for his Life.

Ante Caſe 64.

Nott verſus *Hill.*

Caſe 161.
Eodem die.
In Court Lord Keeper.
2 Ch. Rep. 120.
A Purchaſe of a Reverſion from an Heir in the Life of his Father at an Under-value ſet aſide; tho' if the Heir had died before his Father, the Purchaſor

THE Plaintiff being intitled to an Eſtate Tail, after the Death of Sir *Thomas Nott* his Father, in a Houſe at *Richmond* in *Surry*, which, if in Poſſeſſion, was worth to be ſold about 800 *l*; and being caſt off by his Father, and deſtitute of all means of Livelihood, did in 1671 for 30 *l.* paid him in Money, and 20 *l. per Ann.* ſecured to be paid him during the joint Lives of him and his Father,

would have loſt all his Money.

absolutely convey his Remainder in Tail to the Defendant *Hill*'s Father and his Heirs.

Ante Caſe 134.

Vid. poſt Caſe 268.

The Plaintiff's Father lived 10 Years after this Conveyance; and after his Father's death, Plaintiff brought his Bill to be relieved againſt this Conveyance, charging, that it was intended to be only as a Security; and tho' there was no Proof to that purpoſe, and the Deed was abſolute; and tho' *Hill* had loſt all his Money, if the Plaintiff had died in his Father's Life-time, yet upon the firſt hearing of this Cauſe, 20 *June*, 34 *Car.* 2. the Lord *Nottingham* decreed a Redemption.

Note, This Decree not being Signed and Enrolled, the Cauſe was reheard before the *Lord Chancellor Jefferys*, 27 *May* 1687, who reverſed the Lord *Guilford*'s Decree, and confirmed the Decree made by the Lord *Nottingham*, declaring, he took *Hill*'s Purchaſe to be an unrighteous Bargain in the beginning; and that nothing which happened afterwards could help it.

And this Cauſe being now reheard before the *Lord Keeper*, he reverſed the Lord *Nottingham*'s Decree, and declared, he did not ſee how he could relieve the Plaintiff: If it be to be declared a Law in *Chancery*, that no Man muſt deal with an Heir in his Father's Life-time, that were ſomething; but as it now ſtood, he ſaw no Reaſon to relieve the Plaintiff; but diſmiſſed the Bill.

Caſe 162.

Earl of *Macclesfeild* verſus *Fitton.*

19 Maij. *In Court Lord Keeper.*

THE Bill was to have the Redemption of a Mortgage of the Manor of *Boſley* and *Siddington* in the County of *Cheſter*, that was formerly the Eſtate of Sir *Edward Fitton*, which Mortgage had been Aſſigned to the Defendant *Fitton*. The Bill was exhibited ſo long ſince as *Feb.* 1662. But being then put off for want of proper Parties, the Plaintiff claiming the Eſtate by the Will of Sir *Edward Fitton*, and had not brought the Coheirs to a hearing, and ſo the Cauſe ſlept till now, the Lord *Macclesfeild* being all the while in Poſſeſſion.

Mortgagee aſſigns his Mortgage to *J. S.* who pays off the Principal and the Intereſt which is conſiderably in Arrear.

Whether this Intereſt ſhall be reckoned Principal againſt the Mortgagor.

The Points now inſiſted on, were two.

Firſt,

Firſt, Upon the Aſſignment to the Defendant *Fitton*; the Debt was ſtated betwixt him and the Mortgagee, and ſome of the Coheirs, that were then look'd upon to have a Right to the Redemption: And the Defendant's Council inſiſted, that this ought to conclude the Plaintiff, as a ſtated Accompt: But the Plaintiff being no Party thereunto, *that* was over-ruled by the Court.

Secondly, There being great Arrears of Intereſt due at the time of the Aſſignment, which were paid by Mr. *Fitton*, the original Mortgage-money being but 1500 *l.* and he paid upon the Aſſignment 2300 *l.* The Queſtion was, whether the 800 *l.* paid for Intereſt then in Arrear ſhould be reckoned Principal, as to the Defendant *Fitton*, and carry Intereſt with it.

For the Plaintiff it was inſiſted, Intereſt was never made Principal in ſuch a Caſe, unleſs the Mortgagor had joined in the Aſſignment; and they cited the Caſe of *Porter* and *Hubbart*, where in a like Caſe it was decreed, that Intereſt ſhould be reckoned Principal; but for that Reaſon the Decree was reverſed in the *Houſe of Lords*.

But the *Lord Keeper* ſaid, that Precedent would not weigh much with him: he was of Council in the Caſe, and it was hard in all its Circumſtances; for there the Mortgage being in the late times, altho' the Mortgagor received all the Profits without Interruption, when things were dearer than ordinary, by reaſon of the Troubles in other parts of the Kingdom, yet in that Caſe the *Lords* would not allow of *6 l. per Cent.* Intereſt, but reduced the Intereſt to 4 *l. per Cent.* But altho' he thought it reaſonable that the Intereſt paid upon the Aſſignment ſhould be reckoned Principal; yet he would not now make a New Precedent; But directed the Defendant's Council to ſearch for Precedents, and if they could find any One, he would follow it in this Caſe; But the Plaintiff's Council affirmed, there was no ſuch Precedent. Vid. 1 Ch. Rep. 67.

Caſe 163.
21 Maij.
In Court Lord Keeper.

This Court will not order a Writ of Error in a Criminal Caſe to be ſeal'd, till 'tis firſt ſigned and allowed by the Attorney General.

Crawle verſus *Crawle.*

A Man being indicted for not coming to Church, and found Guilty, Application was made to Mr. *Attorney General*, that they might bring a Writ of Error, but he refuſed to allow thereof; And thereupon Mr. *Wallop* this day moved the Lord *Keeper* for a Writ of Error: But the Lord *Keeper* told him, that tho' he had the Cuſtody of the Great Seal, yet he could make no Uſe thereof, but according to the Courſe of the Court; and therefore could not put the Seal to a Writ of Error till it had been firſt ſigned and allowed by Mr. *Attorney*: And he took it, that a Writ of Error in a Criminal Matter was *ex gratia Regis* in all Caſes, but where Proviſion is made for the ſame by the Statute, and is not due *ex Debito Juſticiæ* or *de Curſu*, as Mr. *Wallop* would have it: But if there were real Error in the Caſe, and a Writ of Error was not ſought for delay, their way was to petition the *King*, and he would give directions for inſpecting the Proceedings, to ſee if there was real Error, or whether a Writ of Error was ſought purely for Delay: And Mr. *Attorney* ſaid, that *Crawley* being indicted upon the *Stat'* 3 *Jac'*, no Error could avail him; and the Indictment could not be quaſhed, nor the Proceedings avoided, otherwiſe than by Conformity.

Writ of Error in a Criminal matter not due *ex Debito Juſticiæ.*
Poſt Caſe 168.

Caſe 164.
26 Maij.
In Court. Lord Keeper.

Feme Mortgagee in Fee of a Copyhold marries, and dies, living the Husband. Whether the Husband, as Adminiſtrator to the Wif, or the Heir ſhall

Turner verſus *Crane.*

A Feme Sole having a Mortgage in Fee of a Copyhold marries; and dies leaving Iſſue, which Iſſue is admitted and dies, and then the Husband as Adminiſtrator to his Wife claims Title to this Copyhold, as being a Mortgage, and ſo part of his Wife's Perſonal Eſtate.

The Queſtion being now between the Husband and the Heir at Law; the Lord *Keeper* declared, he would be

attended

attended with Precedents; but ſaid, he did not much regard what had been objected, that the Iſſue of the Feme had been admitted by the Husband. But all he ſcrupled was, that in this Caſe there was no Covenant for the Payment of the Mortgage-mony, which alone gives the Executor Title to the Mortgage-mony: And altho' it was urged, that there could be no ſuch Covenant in the Surrender of a Copyhold, and that it would be unreaſonable and inconvenient to have one Law, as to Freehold Mortgages, and another as to Copyhold; yet he would make no Decree in it, till he ſhould be attended with Precedents.

have the Benefit of the Mortgage, there being no Covenant to pay the Mony.

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Term. S. Trinitatis,

35 *Car' II.* 1683.

In Curia Cancellariæ.

Case 165. *Anonimus.*

Lord Keeper. If a Cause has slept twelve Months in Court; there shall be no Proceedings had upon it, without first serving a *Subpœna ad faciendum Attornat'*.

Case 166. *Anonimus.*

WHERE a Man is Arrested upon an Attachment, the Contempt shall hold good, tho' no Affidavit be filed at the time of taking forth the Attachment, if it be filed before the Return of it.

Case 167. *Creed* versus *Covile.*

15 Junij. *In Court Lord Keeper.*

Whether the Trust of an Estate in Fee descended upon

THE single Point of this Case was, whether the Trust of an Estate in Fee descended upon the Heir is liable in Equity to the Satisfaction of a Debt by Bond, wherein the Heir is expresly bound?

The late *Lord Chancellor* had decreed it Aſſets; but upon a Rehearing before the *Lord Keeper*, he ſeemed doubtful.

the Heir, is liable in Equity to the Satisfaction of a Debt by Bond, wherein the Heir is bound.

For the Heir againſt the Decree it was ſaid, that this Point had formerly been ſettled upon great Advice in the Caſe of *Box* and *Bennet*, which was heard by the *Lord Chancellor*, with the Aſſiſtance of the *Lord Chief Juſtice Hales*, and Mr. *Juſtice Wadham Windham*. And that this Decree was unreaſonable, in that an Accompt of the Profits was decreed during the Infancy; whereas at Law if the Heir is bound in the Bond of the Anceſtor, and after the Death of his Anceſtor is ſued during his Infancy, the *Parol* muſt demurr, and the Plaintiff can't have Judgment againſt the Infant, neither are the Profits liable, during his Minority.

But for the Decree it was argued, that the Precedent of *Box* and *Bennet* was look'd upon as a hard Caſe, and had never carryed any great Authority with it; it being a Precedent of the *Judges* making, who look upon the Court of *Chancery* as precarious in its Juriſdiction, and therefore, as much as may be, are for reſtraining it to the Rules of Law: But a Truſt, being a Creature of this Court, ought to be governed ſolely by the Rules of Equity, and Equity ought to be conformable throughout; and therefore why ſhould not the Truſt of an Inheritance be Aſſets, as well as the Truſt of a Term? An Equity of Redemption is every Day made Aſſets in Equity; and what Reaſon can be given, why in Equity a Truſt of an Inheritance ſhould not be Aſſets, where the Inheritance it ſelf, had it not been in Truſt, would have been Aſſets at Law?

As to the Profits during Minority, they ſaid, that was not inſiſted on by them, tho' they had no Precedent in Equity, that the *Parol* ſhould Demurr; but Infants were there Suable.

Whether the Parol ſhall demur in Equity, in Caſe of a Deſcent of a Truſt to an Infant.

Lord Keeper. I know the Caſe of *Box* and *Bennet* has had hard Words given it, and been much railed at; but the Decree in that Cauſe was made upon great Advice, and he did not know, how he could be better adviſed now; and ſaid, there was a difference between the Caſe of an Heir, and the Caſe of an Executor; and therefore the Truſt of a Term and the Truſt of an Inheritance are not the ſame thing, as to this Point: For whatever Mony comes to the Hands of the Executor, either by Sale of the Term, or if Mony be decreed to him in this Court, will be Aſſets: But if an Heir, before an Action brought, ſells and aliens the Aſſets, the Mony is not at Law liable in his Hands; unleſs the Sale were with Fraud or Colluſion; as if an Heir ſell and buy again, there the new purchaſed Lands will be Aſſets. And as to an Equity of Redemption, he ſaid, that if a Man had a Mortgage and a Bond; before the Mortgage ſhould be redeemed by the Heir the Bond ought to be ſatisfied; but he did not know, that an Equity of Redemption ſhould be Aſſets in Equity to all Creditors: And mentioned Mr. *Baron Weſton*'s Caſe againſt Mrs. *Danby*, which was thus.

Baron Weſton had a Debt due to him by Bond, wherein the Heir was bound, but it happened that for three Deſcents the Heir was ſtill an Infant, and ſo the *Parol* demurred at Law, till the Intereſt much exceeded the Penalty of the Bond: And Mrs. *Danby* having been all along Guardian to theſe Infants, and received the Profits of the Eſtate without paying any Debts, and converted them to her own uſe, the *Baron* therefore brought an Action againſt her, and called her Adminiſtrator to theſe Children; but the *Baron*'s Policy did not prevail.

As to the Caſe in Queſtion, his Lordſhip ſaid, he would not throw ſuch a Cauſe out of Court without good Conſideration firſt had, and that he ſhould be much governed by the Precedent of *Box* and *Bennet*, unleſs they could ſhew, that the latter Precedents had been otherwiſe; and

directed

directed them to attend him with Precedents towards the latter end of the Term.

The Rioters Caſe.

Caſe 168.

Eodem die.

In Court. Lord Keeper.

A Motion for a *Mandatory* Writ to the Chief Juſtice of the *King's Bench* to ſign a Bill of Exceptions, denied, tho' ſuch Writ has iſſued out of *Chancery* to a Judge of an inferior Court.

THIS Day a Motion was made, That the Lord *Keeper* would grant a *Mandatory* Writ to the *Chief Juſtice* of the *King's Bench* to command him to ſign a Bill of Exceptions in the Caſe of the *Lord Gray & al'*, who were convicted for a Riot in *London*; and they produced a Precedent, where in a like Caſe ſuch a Writ had iſſued out of *Chancery* to the Judge of the Sheriff's Court in *London*.

But the Lord *Keeper* denied the Motion: For that the Precedent they produced was to an Inferior Court, and he would not preſume, but the *Chief Juſtice* of *England* would do what ſhould be juſt in the Caſe; for poſſibly you may tender a Bill of Exceptions that has falſe Allegations in it, and the like; and then he is not bound to ſign it; for that might be to draw him into a Snare: and ſaid, if they had wrong done them, they might right themſelves by an Action of the Caſe: And if this Court had a Power to grant ſuch a Writ, the ſame was diſcretionary only, as Writs of Error are in Criminal Caſes, which are diſcretionary and not *de curſu*: And ſaid he had a Collection of ſeveral Caſes out of the old Books of the Law, that were given unto him by my Lord *Chief Juſtice Hales*, which ſhew that Writs of Error in Criminial Caſes are not grantable *ex debito Juſtitiæ*, but *ex gratia Regis*: And in ſuch a Caſe a Man ought to make Application to the *King*, and he will then refer it to his Council, and if they certifie there is Error, the *King* will not deny a Writ of Error.

Ante Caſe 163.

Bar-

Barbone verſus *Brent.*

Caſe 169.
19 Junij.
In Court Lord Keeper.
Money paid in Part. Receipts loſt. The whole recovered at Law. No diſcovery after a Verdict.

THE Bill was to have an Account, ſetting forth, that the Plaintiff had bought ſeveral Goods of the Defendant, and had paid him ſeveral Sums of Mony in Part of Satisfaction, but the Plaintiff having loſt the Receipts and Acquittances, the Defendant had recovered the whole Value of the Goods at Law.

The Defendant Demurred to this Bill, becauſe it appeared of the Plaintiff's own ſhewing, that the Defendant had recovered at Law.

For the Plaintiff it was inſiſted, that if this Caſe upon the Bill was true, which by the Demurrer is admitted ſo to be, the Plaintiff ought to be relieved in Equity, as to the Mony overpaid.

Lord Keeper. If a Man pays Mony in Part of Satisfaction, and afterwards the whole Value of the Goods is recovered againſt him at Law, the Mony ſo paid upon that Account becomes Mony received for the Uſe of him that paid it, and he may recover it in an Action at Law.

But it was anſwered by the Plaintiff's Council, that tho' that may be true, where the whole Debt is recovered, yet it would not be ſo in this Caſe, becauſe here the Jury had allowed ſome Payments and made ſome Abatement of the full Value, but had not allowed all the Payments; becauſe the now Plaintiff could not produce his Receipts: And now if they ſhould bring an Action at Law for the Mony ſo overpaid, they could not make out what Payments the Jury allowed and what not. *Sed non allocatur.*

It was then inſiſted by the Plaintiff's Council, that they were intitled to have a Diſcovery in this Court in order to enable them to proceed at Law, they having loſt their Receipts and Acquittances.

Lord Keeper. After a Verdict at Law you come too late for that, and I ſee no reaſon why the Defendant ſhould be put to anſwer. Allow the Demurrer.

Portington verſus *Tarbock*

Caſe 170.

Eodem die.

In Curia. Lord Keeper.

Whether an Appeal will lie to this Court from a Decree in a Court of Equity in a *County Palatin.*

THE Bill was a Bill of *Review* and *Appeal* to ſet aſide a Decree in the Court of *Exchequer* in the *County Palatin* of *Cheſter* made in a Cauſe wherein the now Defendant was Plaintiff, and the now Plaintiff was Defendant; and it was charged in the preſent Bill, that there was no ſufficient Ground for making the ſaid Decree.

The Defendant put in a Plea, and ſet forth that the Parties to the ſaid Decree were, and long had been, Inhabitants in the ſaid *County Palatin*, and that the Lands mentioned in the Decree lay within the ſaid *County Palatin*, and Matters in Queſtion aroſe there; and that by the ancient Privileges and Uſages in the ſaid *County Palatin*, ſuch Parties and Matters were and ought to be ſued and impleaded there, and not elſewhere, and that the Decree in itſelf was juſt, and not queſtionable in this Court.

For the Plaintiff it was inſiſted, that the Court of *Chancery* was the Supreme and high Court of Equity; and it was therefore but juſt and natural, that an Appeal ſhould lie to it, to correct the Miſtakes and Abuſes of the Inferior Courts. And it was ſaid by the Council, that altho' ſuch Bills had not been frequent here, yet they were not without Precedents of the like nature; and they cited the Precedent of *Edwiſh* and *Davis*, where ſuch a Plea was over-ruled, and the Defendant

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put to Anſwer: And the Caſe of *Humphreyes* and *Griffith*, where in the Equity Courts of North *Wales* they had decreed an Infant to convey; and the Decree was for that Reaſon reverſed in this Court: And they cited a Caſe in the Lord *Nottingham*'s time, where an Appeal from the *Mayor*'s Court in *London* was allowed; but they were not relieved in that Caſe, becauſe they had firſt brought a *Certiorari* Bill, and afterwards conſented to a *Procedendo*, and by that had diſclaimed the Juriſdiction of this Court; and therefore the Court would not entertain them upon their Appeal.

The Council for the Defendant chiefly inſiſted on the Practice of this Court, that ſuch Bills had not been uſual, and that moſt of the Caſes cited were *Certiorari* Bills; and that all Courts of Equity were by Preſcription, and therefore were all equal; and no Appeal would lye.

A *Certiorari* Bill may be brought to remove a Cauſe out of a Court of Equity in a County *Palatin* to this Court.

The *Lord Keeper* declared, he thought it reaſonable, that an Appeal ſhould lye. There is no doubt but a *Certiorari* Bill might have been brought to remove this Cauſe: But no Bill of Review can be brought, for that is only to reinſpect what the ſame Court had before done. As to an Appeal it ſeemed to him reaſonable. *Firſt*, Becauſe this Court is the High and Supreme Court of Equity, and the others are but inferior Courts. *Secondly*, Even from this Court there formerly lay an Appeal to the *King*, and that was the Courſe, till the *Houſe* of *Lords*, which is the Higheſt Court, had frequent Meetings, and there determined all Matters upon Appeal: And if from this Court there lyes an Appeal to the *King* himſelf, why ſhould there not lye an Appeal from inferior Courts to this Court, where the *Chancellor* or *Keeper* ſit by the *King*'s Commiſſion. There is no doubt, but this Court may hold Plea for Matters within the County *Palatine*, becauſe the Parties may live out of the Juriſdiction.

Vid. poſt Caſe 181 & 182. Where it was adjudged an Appeal would not lye, and the Plea in this Caſe was allowed.

The *Lord Keeper* would do nothing in the Caſe at this time, but directed them to attend him with Precedents.

The

The Lady *Bodmin* verſus *Vandenbendy.*

Caſe 171.
Eodem die.
In Court Lord Keeper.
2 Ch. Rep. 172.
Caſes in Parl. 69.

Bill by a Dowreſs to remove a Truſt Term.

Defendant pleads himſelf a Purchaſor, but does not deny Notice.

Ordered to anſwer.

THE Bill was, that the Plaintiff might by the Aid of this Court be let in to try her Title at Law, for Dower of the Lands in queſtion, there being a Term for Years ſtanding out, that had been raiſed for particular Purpoſes, and ſhe offered by her Bill to diſcharge the Truſt of the Term, and prayed that the Term might be made Attendant on her Dower.

To this the Defendant pleaded himſelf a Purchaſor, (but did not plead himſelf a Purchaſor without Notice) and inſiſted on the Benefit of the Term to protect his Purchaſe.

The Defendant was ordered to anſwer.

Knight verſus *Bampfeild & al'.*

Caſe 172.
Eodem die.
In Court Lord Keeper.

A Jointure made of an Equity of Redemption: the Husband becomes a Bankrupt, and the Aſſignees of the Commiſſioners ſtate an Account with the Mortgagee.

If the Jointreſs will be relieved againſt this Account, ſhe ought in her Bill to aſſign particular Errors.

A Man makes a Mortgage, and after Forfeiture for Non-payment of the Mortgage-mony he Marries, and conveys the Equity of Redemption to Truſtees, to the Uſe of himſelf for Life, Remainder to his Wife for her Jointure, and afterwards becomes a Bankrupt. The Commiſſioners aſſign this Equity of Redemption in Truſt for the Creditors, and the Aſſignees ſtate an Accompt with the Mortgagee.

The Jointreſs brings her Bill to be relieved againſt this Accompt, alledging it was not fairly ſtated, but that the Aſſignees by Combination with the Mortgagee, had allowed more Mony than was really due on the Mortgage.

The Defendant pleaded this ſtated Accompt.

Lord

Lord Keeper. The Aſſignees ſtand in the place of the Husband, and the Account by them ſtated ought to be as concluſive, as if it had been ſtated with the Husband; and the Bill is not right in charging a general Fraud in the ſtating of this Account, but the Plaintiff ought to have aſſigned particular Errors in the Account; however he gave the Plaintiff leave to amend her Bill.

Caſe 173.
Eodem die.
In Court Lord Keeper.
Bill brought by an Obligee in a Bond againſt the Heir of the Obligor for a Satisfaction of the Debt out of Aſſets, but it is not ſhewn, that the Heir was bound in the Bond.
A good Cauſe of Demurrer.

Croſſeing verſus *Honor.*

BILL brought by the Obligee in a Bond againſt the Heir of the Obligor, alledging that he having Aſſets by deſcent ought to ſatisfie this Bond.

The Defendant demurred, becauſe the Plaintiff had not expreſly alledged in the Bill, that the Heir was bound in the Bond; and tho' it was alledged that the Heir ought to pay the Debt, yet that was held inſufficient, and the Demurrer was allowed.

Caſe 174.
Eodem die.
In Court Lord Keeper.
A Freeman of *London* leaves the City and lives in the Country 20 Years; marries, and makes his Wife a Jointure and dies.
The Wife ſhall have her Share by the Cuſtom.

Rutter verſus *Rutter.*

A Man that was a Freeman of *London* leaves the Town, and lives in the Country for twenty Years together, and Marries, and makes his Wife a Jointure, and dies. She exhibits her Bill to have her Share of her Husband's Perſonal Eſtate according to the Cuſtom of the City of *London.* The Defendant pleaded the Husband's leaving the Town, and living twenty Years in the Country, and the Jointure. But the Plea was diſallowed.

Caſe 175.
Eodem die.
In Court. Lord Keeper.
Bill for diſcovery only of a Bond loſt.

Anonimus.

WHERE a Man brings a Bill for diſcovery of a Bond, he need not make Oath he has loſt the Bond;

Bond; as he must do, if the Bill was to be relieved for the Duty.

No Affidavit necessary. Otherwise if relief prayed. *Ante Case 56. con'.* *Post Case 241. accord.*

Cevill versus *Rich.*

Case 176.

20 Junij. *In Court Lord Keeper.*

UPON a Rehearing; the Question was, whether an Advancement of a Daughter on Marriage by Land of Inheritance was such an Advancement as should exclude her from her Customary Part of the Personal Estate of her Father, who was a Freeman of *London?* In the Case of the Son and Heir at Law, it was admitted it would not exclude him: But in this Case there being two Daughters and Coheirs, and one being advanced by Land of Inheritance on her Marriage, the Case is more doubtful, and the *Lord Keeper* ordered that the *Recorder* should certifie the Custom of the City of *London* in that Point.

Whether a Settlement of Land on a Daughter upon her Marriage will bar her of her Share of her Father's Personal Estate by the Custom of *London.* *Post Case 213.*

Davies versus *Weld & al'.*

Case 177.

In Court Lord Keeper.

THE Defendant *Weld* was the surviving Trustee in a Settlement made on the Marriage of the Plaintiff *Davies* and his Wife, whereby Land was settled upon the Baron and Feme for their Lives, Remainder to Trustees to preserve contingent Remainders, Remainder to their first and every other Son in Tail Male. The Plaintiff and his Wife had been married 12 Years, and never had any Issue, and having contracted Debts, the Bill was, that they might be enabled to sell Part of their Estate for Payment of Debts.

2 Ch. Rep. 144

Whether a Trustee for preserving contingent Remains shall be decreed to join in a Sale to pay Debts, when there is no Probability of Issue.

The Defendant, the Trustee, by Answer set forth the Settlement, and confessed the Plaintiffs had been married so many Years, and had had no Issue, and believed they never would have any, and that they had contracted such Debts, and submitted to do, as the Court should direct, so as he might be indempnified.

For the Plaintiff it was inſiſted, that the Court in ſuch Caſes had decreed the Land to be ſold for Payment of Debts; and for Precedents they cited the Caſe of *Digby* and *Cornwallis*, and Sir *John Tufton*'s Caſe, and they ſaid, that Neceſſity does create a natural Equity.

But the *Lord Keeper* declared, he did not ſee how he could make ſuch a Decree; for he had known, where People had been married near 20 Years without Iſſue, and after had Children: But at the Plaintiffs Importunity he gave time till *Michaelemas* to attend him with Precedents.

Caſe 178.

Lomax verſus *Bird.*

He that comes to redeem a Mortgage, muſt ſhew a Title to the Equity of Redemption.

THE Plaintiff claiming under the Heir general came to redeem a Mortgage. The Defendant by Anſwer ſet forth a Deed of Intail, intitling another Perſon to the Equity of Redemption.

The Plaintiff prayed he might redeem at his Peril, but the *Lord Keeper* would not admit him to do it, unleſs he could make out that the Eſtate Tail was docked.

Caſe 179.

4 Julij. *Lord Keeper.*

Thorne verſus *Thorne.*

Mortgage in Fee is a Revocation *pro tanto* only of a Settlement with Power of Revocation.

THORNE being ſeized in Fee by a Voluntary Conveyance ſettles his Lands to the Uſe of himſelf for Life, Remainder to his Daughter and Heir apparent in tail, Remainder to his three Brothers in tail, Remainder to himſelf in Fee, with Power of Revocation: and ſeven Years after mortgageth thoſe Lands in Fee, and the Condition of the Redemption was, that if the Mortgagor or his Heirs paid the Mony at the Day, he ſhould have the Lands in his former Eſtate. The Mortgage was made to one of the three Brothers that were the Remainder Men. The Mortgage became forfeited, and the Mortgagee afterwards purchaſed of his eldeſt Brother, who was the Heir at Law.

The

The third Brother brought his Bill for a third Part, by vertue of the Remainder in Tail limitted to him and his two Brothers: and the Queſtion was whether the Mortgage was a total Revocation or but *pro tanto*.

The Lord *Keeper* declared it was a Revocation *pro tanto* only, the Mortgagor being to have the Lands, on Payment, as in his former Eſtate, and Decreed it accordingly.

George Talbot, Plaintiff.
Edward Braddill, Defendant.

Caſe 180.
Lord Keeper.

THE Plaintiff being ſeized in Poſſeſſion of Lands of 15 *l. per Ann.* and in Reverſion after the Death of his Mother of other Lands of about 17 *l. per Ann.* and of other Lands after a Term of twenty ſix Years to come of 8 *l. per Ann.* (which Eſtate was ſubject to Incumbrances) did by Deed and Fine in *March* 1657, in conſideration of 320 *l.* demiſe thoſe Lands to the Defendant for 99 Years at 5 *s. per Ann.* Rent, upon condition, that if the Plaintiff or his Heirs ſhould pay the Defendant 380 *l.* the 25th of *March* which ſhould be in the Year 1688, then the Conuzees ſhould ſtand ſeized to the Uſe of the Plaintiff and his Heirs: and the Plaintiff covenanted for the Defendant's Enjoyment accordingly.

Mortgagor admitted to redeem before the Day of Payment in the Deed.

And now in 1682, 25 Years after the Conveyance, the Plaintiff brings his Bill to be admitted to redeem the Premiſes, and to have an Account of Profits from the date of the Deed, alledging that tho' the Deed was in that form, yet it was nevertheleſs agreed between him and the Defendant, that it ſhould be a Mortgage, and redeemable at any time upon Payment of 320 *l.* and Intereſt; and tho' there was no Proof of any other Agreement than the Deed, and that there was a Bond to perform the Covenants of the Deed,

and altho' it appeared, that the Eſtate conſiſted much in old Buildings and a Mill, and that the Defendant had laid out above 100 *l.* in Repairs; yet in regard the Plaintiff's Mother died within three Years after the Deed, whereby the Revenue exceeded the Intereſt of the Mony, the Lord *Keeper*, notwithſtanding there was a Contingency at the time of the Deed, thought this an unreaſonable Bargain, and did decree an Account of the Profits *ab origine*, and a Redemption on Payment of what the Profits fell ſhort of the 320 *l.* and Intereſt, and appointed the ſame to be paid at a Day certain, and not to expect till 1688 according to the Condition of the Deed.

Caſe 181.

Jennet & *Ux'*, verſus *Biſhopp* & *al'*.

14 Julij.

In Court Lord Keeper.

No Appeal lies to this Court from a Decree in a *County Palatin.*

THE Bill was a Bill of Appeal and Review, the Cauſe having been heard and decreed in the *County Palatin* of *Cheſter*. To this Bill the Defendants Demurred. And after long debate the Lord *Keeper* allowed the Demurrer, and declared his Opinion to be, that ſuch a Bill would not lye: But if any Appeal lies, it muſt be to the *King* himſelf.

See the next Caſe.

Partington verſus *Tarback*.

Caſe 182.

Eodem die.

In Court Lord Keeper.

THIS Bill being of the ſame Nature with the laſt Caſe, the Lord *Keeper* gave the ſame Rule in it, and allowed the Plea.

Vid. ante Caſe 170.

Killigrew verſus *Killigrew*.

Caſe 183.

Eodem die.

Outlawry no bar to the Suit of an Executor.

THE Bill being to be reliev'd touching a Debt due to the Plaintiff as Executor, the Defendant pleaded an *Outlawry* of the Plaintiff in Barr: but the Plea was overruled, the Plaintiff ſuing in *anter Droit* as Executor.

Somerſet

Somerſet verſus *Fotherby.*

Caſe 184.
Eodem die.

THE Bill being to examine Witneſſes in *Perpetuam rei memoriam* to prove a *Modus Decimandi*, the Defendant demurred, for that the Bill was to Eſtabliſh a Cuſtom againſt the Church, and in Prejudice of Tythes, that are due *comuni jure:* And ſeveral Precedents were cited, where Bills to have a *Modus* decreed were upon a Demurrer diſmiſſed: But this Bill being only to preſerve Teſtimony, the Lord *Keeper* thought it reaſonable the Defendant ſhould Anſwer, and over-ruled the Demurrer.

Bill lies to perpetuate the Teſtimony of Witneſſes to prove a *Modus.* But 2. it ir will lie to eſtabliſh a *Modus.*

Price verſus *Price.*

Caſe 185.
Eodem die.

TO the Plaintiff's Bill the Defendant pleaded, he was a Purchaſor *bona fide* for a Valuable Conſideration; But there being ſeveral badges of Fraud alledged in the Bill, tho' the Defendant in his Plea had denyed them, yet becauſe he had not denyed them by way of Anſwer, that ſo the Plaintiff might be at Liberty to except, the Plea was over-ruled.

Plea over-ruled, becauſe the Fraud alledged in the Bill was denied in the Plea, and not by way of Anſwer.

LAST Term dyed Sir Edmond Saunders, Lord Chief Juſtice *of the* King's Bench, *and Sir* George Jefferies *was this Vacation ſworn in his room: Sir* Francis Pemberton *this Vacation was removed, and Sir* Thomas Jones *Senior* Judge *of the* King's Bench *ſucceeded him as* Chief Juſtice *of the* Common Pleas. *And there being two Vacancies in the* King's Bench *by the Death of* Juſtice Raymond, *and removal of Sir* Thomas Jones, *Serjeant* Holloway *and Serjeant* Walcot *were made* Juſtices *of the* King's Bench. *Sir* Francis Pemberton *came to the Bar and Practiſed the firſt Day of the Term,*

altho' it was rumour'd, he was forbid to Practice: and he continued a Privy Counſellor, *till the* King *had ſtruck him out with his own Hand. Mr.* Herbert *ſucceeded Sir* George Jefferies *in the* Chief Juſticeſhip *of* Cheſter.

In this Vacation the Lord Keeper North *was made Baron of* Guilford.

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DE

Term. S. Michaelis,

35 *Car' II.* 1683.

In Curia Cancellariæ.

Anonimus.

Case 186.

WHERE a Man is to perfect his Anſwer upon Interrogatories, or to be examined for a Contempt, altho' the Rule of Court be, that he ſhall be examined in four Days or ſtand committed; yet if the Party be in the Country, he ſhall have a Commiſſion to take his Examination.

Edmunds verſus *Povey & al'.*

Case 187.

15 Octob. *In Court Lord Keeper.*

Third Mortgagee without Notice at the time of his Mortgage buys in the firſt Incumbrance, being a ſatisfied Judgment. He ſhall have the Benefit of it.

THE Principal Queſtion in this Caſe was touching the buying in of Incumbrances, *viz.* where there are firſt, ſecond and third Mortgagees, who had all lent their Mony without Notice. The third Mortgagee hearing of the two former Securities buys in the firſt Incumbrance, to wit, a Judgment that was ſatisfied: and it was ſtrongly inſiſted at the Bar, that tho' this Trade of buying in Incumbrances had been formerly countenanced here, yet that it was in truth a thing againſt Conſcience, and contradictory to many Eſtabliſh'd Rules of Law and Equity.

But

But after long Debate the Lord *Keeper* told them, he wonder'd the Council lay'd their Shoulders to a Point, that had been ſo long ſince ſettled, and receiv'd as the conſtant Courſe of *Chancery*. It is true, there have been ſtrong Arguments uſed againſt the Unreaſonableneſs of this Practice, and there might be likewiſe ſtrong Reaſons brought for the maintaining of it, and ſo was at firſt a Caſe very diſputable; but being once ſolemnly ſettled, as it was in the Caſe of 1 Ch. 162. *Marſh* and *Lee*, he would not now ſuffer that Point to be ſtirr'd.

The Council in their own Juſtification replied, That his *Lordſhip*, when this Cauſe came firſt before him, had referred it to Sir *Adam Ottley*, to ſtate the Caſe ſpecially, and it now came before him on the Maſter's Report, and there was no other Point in the Caſe but this; and therefore they ſuppoſed his Lordſhip intended they ſhould be at Liberty to ſpeak to that Matter.

But his Lordſhip declared, he would not change the Rule, that had ſo long prevailed in this Caſe; but it may be, he might do ſo, where he found a Man deſigning a Fraud, and thought to make a Trade of Coſening by the Rules of the Court.

Serjeant *Pemberton* moved, that as to the Point of Notice he ſuppoſed his Lordſhip meant, that a Man that buys in a Prior Incumbrance, muſt do it without Notice of the Middle Incumbrance, not only when he lent his Mony, but alſo at the time when he bought in the Prior Incumbrance. *Sed non allocatur.*

Caſe 188.

29 Octobris.

In Court Lord Keeper.

Chapman verſus *Bond.*

A Purchaſor takes a Term in a Truſtee's

WHERE a Man takes an Aſſignment of a Term in a Truſtee's Name, and the Inheritance in his own Name; ſo that by Conſtruction in Equity the Term

is attendant upon the Inheritance; this Term in Equity shall be Assets for the Payment of Debts, as well as a Term taken in his own Name is Assets at Law: But with this difference, that the Heir shall have the Benefit of the Surplus of the Trust of a Term, and not the Executor after Debts paid: But if a Term be expresly declared by Deed to be Attendant on the Inheritance, there such a Term shall not be made Assets in Equity.

Name, and the Inheritance in his own; this Term, unless declared to attend the Inheritance, will be Assets in Equity.

If he takes the Inheritance in a Trustee's Name, and a Term in his own, it will be Assets at Law. *Vid.* 2 *Ch. Rep.* 152.

Note, This Point was not directly in the Case, but came in by way of Argument only: And so the difference that had been formerly taken in this Case between Legal and Equitable Assets was exploded.

Tremaine versus *Tremaine.*

Case 189.

THIS Cause was between Father and Son, and there having been great Heat and indecent Reflections on both Sides in Bill and Answer, and the Matter being ended this Vacation by Compromise; Upon Motion this Day made in Court by Mr. *Porter*, the Bill and Answer were taken off the File by Consent.

Bill and Answer (the Cause being agreed) ordered to be taken off the File by Consent of Plaintiff and Defendant.

Comes Ranelaugh versus *Hayes.*

Case 190.

30 Octobris.

In Court. Lord Keeper.

THE *Earl* of *Ranelaugh* assigns several Shares of the Excise in *Ireland* to Sir *James Hayes*, and Sir *James* Covenants to save the *Earl* harmless in respect of that Assignment, and to stand in his Place touching the Payments to the *King*, and other matters, that were to have been performed by him. The Plaintiff the *Earl* of *Ranelaugh* suggests in his Bill, that he is sued by the *King* for 20000 *l.* and that the Defendant Sir *James Hayes* by the Agreement ought to have paid it; and therefore prays the Defendant may be decreed to perform the Agreement in Specie.

2 Ch. Rep. 146.

Covenant to save harmless. Decreed in Specie.

It was inſiſted for the Defendant, that here was no proper Subject for Equity, nor any Thing that the Court could Decree; For here was no Specifick Covenant, but only a General and Perſonal Covenant for Indempnity; And that was not decreeable in Equity; for it ſounds only in Damages, which cannot be aſcertained in this Court; eſpecially as this Caſe is, there being no Breach of the Covenant aſſigned in the Bill: For a Suit being brought by the *King*, that is not in it ſelf any Breach, for the Defendant cannot prevent that. He will defend the Suit, and if nothing is recovered, there is no Breach.

But the *Lord Keeper* in this Caſe thought fit to decree that Sir *James* ſhould perform his Covenants; and directed it to a Maſter, and that *toties quoties* any Breach ſhould happen, he ſhould report the ſame ſpecially to the Court; and the Court then might, if there ſhould be occaſion, direct a Tryal at Law in a *Quantum damnificatus*: and he conceived it reaſonable, that Sir *James Hayes* ſhould be decreed to clear the *Earl* of *Ranelaugh* from all theſe Suits and Incumbrances within ſome reaſonable time. And he compared it to the Caſe of a Counterbond; where altho' the *Surety* is not troubled or moleſted for the Debt, yet at any time after the Mony becomes payable on the Original Bond, this Court will decree the *Principal* to diſcharge the Debt; It being unreaſonable that a Man ſhould always have ſuch a Cloud hang over him.

A is bound for B, and has a Counter-bond. Equity will compel B to pay the Debt, tho' A is not ſued.

Caſe 191.
6 Novembris.

Howard verſus *Harris*.

In Court Lord Keeper 2 Ch. Rep. 147. *ante Caſe* 31. No Agreement in a Mortgage can make it irredeemable, either after the Death of the Mortgagor, or

MR. *Howard* ſettles a Jointure on Plaintiff his Lady before Marriage, which proving defective, and not of Value according to the Marriage Agreement, he therefore afterwards makes her an additional Jointure of other Lands; and afterwards Mr. *Howard*, in 1673, makes a Mortgage to the Defendant *Harris* for ſecuring 1000 *l.* with Intereſt, in which (amongſt others) part of the Lands belong-

belonging to the additional Jointure was compriſed: And in the Mortgage there is a ſpecial Clauſe of Redemption, *viz.* that if Mr. *Howard*, or the Heirs Males of his Body, ſhould in *June* 1686 pay the Principal Sum of 1000 *l.* and 60 *l. per Ann.* Intereſt in the mean time, then Mr. *Howard* or the Heirs Males of his Body might re-enter; and Mr. *Howard* Covenants that no one but he or the Heirs Males of his Body ſhould be admitted to redeem this Mortgage, and likewiſe Covenants to pay the 1000 *l.* on the day of in the Year 1686, and 60 *l. per Ann.* Intereſt in the mean time, by half-yearly Payments from the Date of the Mortgage.

upon failure of Iſſue Male of his Body.

Mr. *Howard* dies without Iſſue; the Plaintiff being a Jointreſs of part of the Mortgaged Lands, and ſo intituled to redeem the whole, in 1677 exhibits her Bill to redeem this Mortgage.

The Defendant by Anſwer inſiſts, the Lands are now become irredeemable.

This Cauſe was heard before the *Lord Chancellor Nottingham*; and now upon the Defendant's Petition came to be reheard before the *Lord Keeper*, and was by them both decreed for the Plaintiff.

For the Plaintiff it was inſiſted,

Firſt, That Reſtrictions of Redemption in Mortgages have been always diſcountenanced in this Court; and it would be a thing of miſchievous Conſequence, ſhould they prevail; for then it would become a common Practice, and a Trade amongſt the *Scriveners*, ſo to fetter the Mortgagors, as to make it impracticable for them to redeem according to the Preciſe Letter of the Agreement: And the Plaintiff's Council inſiſted, that there was no more in this Caſe againſt a Redemption, than there was in every Mortgage. It is true, here is an expreſs Covenant, that none

Reſtrictions of Redemption in Mortgages diſcountenanc'd in Equity.

none but Mr. *Howard*, or the Heirs Males of his Body, ſhould redeem: And in every Mortgage there is a Proviſo, that in caſe the Mony be not paid by ſuch a Day, the Mortgagee ſhall hold the Land diſcharged, and not only ſo, but there is likewiſe an expreſs Covenant for further Aſſurance; ſo that in every Mortgage the Agreement of the Parties upon the Face of the Deed, ſeems to be, that a Mortgage ſhall not be redeemable after Forfeiture.

Maxim in Equity, that an Eſtate cannot at one time be a Mortgage, and at another time ceaſe to be ſo, by the ſame Deed.

Secondly, It was argued, that it was a Maxim here, that an Eſtate cannot at one time be a Mortgage, and at another time ceaſe to be ſo, by one and the ſame Deed: And a Mortgage can no more be irredeemable, than a Diſtreſs for a Rent-charge can be irrepleviable. The Law it ſelf will control that expreſs Agreement of the Party; and by the ſame Reaſon Equity will let a Man looſe from his Agreement, and will againſt his Agreement admit him to redeem a Mortgage.

A Mortgage cannot be a Mortgage of one ſide only.

Thirdly, It is another ſtanding Rule, that a Mortgage cannot be a Mortgage of one Side only: and here it is plain, Mr. *Harris* may make it a Mortgage; for he has a Covenant for the Repayment of his Mortgage-money. And for Precedents was cited the Caſe of *Killvington* verſus *Gardiner*, who was to redeem at any time in his Life-time; and Sir *Robert Jaſon*'s Caſe.

For the Defendant it was inſiſted, that this expreſs Agreement of the Parties ought to be purſued; and they pretended the ſame was made upon good Conſideration, *viz.* that the Defendant *Harris* had formerly purchaſed theſe very Lands from Sir *Robert Howard*, Father of the Plaintiff's Husband, who pretended himſelf to be ſeized in Fee; but this Land was afterwards evicted, upon pretence that Sir *Robert* was only Tenant for Life; and the Reaſon of this Special Clauſe of Redemption was, that in Caſe Mr. *Howard* ſhould have Iſſue Male, the Eſtate might remain in the Family; but if he had none, it ſhould be left to the Defendant, as ſomething towards a Compenſation for

for the Loſs in his Purchaſe, and Mr. *Harris* was to ſubmit to the Loſs, and not to queſtion Mr. *Howard*'s Title. But as to this they had not a Word of it in Proof, ſaving only, that the Defendant had made ſuch a Purchaſe; but not that this was the Conſideration of the Agreement: And it likewiſe appeared, that Mr. *Howard* claimed by an ancient Settlement from the Lord *Suffolk*, and not by any Settlement made by his Father Sir *Robert*.

Then it was inſiſted, that this additional Jointure was voluntary, and the Plaintiff ought not to take the Eſtate out of the Hands of a Purchaſor. But it was anſwered, he was a Purchaſor for no more than his Mortgage-money; and one that comes in by a voluntary Conveyance may redeem a Mortgage: And if the additional Jointure was voluntary; ſo likewiſe was the Agreement, that none but Mr. *Howard* or the Heirs Males of his Body ſhould redeem; and that was ſubſequent to the additional Jointure.

One that claims under a voluntary Conveyance may redeem a Mortgage.

And it was further urged, that the Mortgaged Eſtate is a Reverſion after Lives only, and is at preſent but 7 *l. per Ann.* and that Mr. *Harris* did actually borrow the Mortgage-mony to lend on this Reverſion; and it could not be preſumed he would have ſo done, unleſs it had been in Conſideration, that this Mortgage had been made in a ſpecial manner redeemable.

But it was anſwered, that poſſibly the Defendant might deſign ſuch a catching Bargain of this Mortgage; but that was a ſort of Circumvention, and the worſt part of the Caſe.

After long Debate, the *Lord Keeper* decreed, the Mortgage ſhould be redeemed; the rather for that the Defendant had a Covenant for Repayment of his Mortgage-moneys; but ſaid, if the Caſe had been, that a Man had borrowed Money of his Brother, and had agreed to make him a Mortgage, and that if he had no Iſſue Male, his

Vid. Caſe of Newcomb *verſus* Bonhana *Ante Caſe* 6.

Brother ſhould have the Land; ſuch an Agreement made out by Proof might well be decreed in Equity.

But then for the Defendant the Mortgagee it was inſiſted, that this Mortgage having been made 10 Years ſince, and of a Reverſion, where 7 *l. per Ann.* Rent was only reſerved; that in this Caſe the Defendant ought to have Intereſt upon Intereſt, otherwiſe he would be a great Loſer in this Caſe.

But as to that, it was anſwered, that the Plaintiff's Bill to redeem was filed ſo long ſince as 1677, and that the Defendant had by Anſwer oppoſed the Redemption; and therefore from that time he had no Pretence to an Allowance of Intereſt for his Damages: And it was never known in this Court, that Intereſt upon Intereſt was at any time allowed in any Caſe.

Where there was a great Arrear of Intereſt due on a Mortgage, Intereſt allowed for the Intereſt reſerved in the Body of the Deed.

But the *Lord Keeper* was clear of Opinion, that as to ſo much Intereſt as was reſerved in the Body of the Deed, that ſhould be reckoned Principal; for it being aſcertained by the Deed, an Action of Debt would lye for it; and therefore it was reaſonable that there ſhould be Damages given for the Non-payment of that Mony. And whereas it was urged, that this had never been practiſed, and that there was not any ſuch Precedent in the Court; and that if this were to be Eſtabliſhed for a Rule, every Scrivener would reſerve all his Intereſt half-yearly, from time to time, as long as the Mony ſhould be continued out upon the Security; which would be to change the Law and Practice in this Court, and make all Mortgagees pay Intereſt upon Intereſt.

But the *Lord Keeper* ſaid, he was clear in that diſtinction between Debt and Damages; And he ſaw no Inconvenience that could enſue: it would ſerve only to quicken Men to pay their juſt Debts; and accordingly decreed, that after a deduction of the Yearly Rents of the mortgaged Premiſes out

out of the 60 *l.* a Year payable for the Intereſt, the Defendant ſhould be allowed Intereſt for the reſidue of the ſaid 60 *l.* a Year, for which the Defendant might have ſued at Law and recovered Damages.

Lyford verſus *Coward.*

Caſe 192.
Eodem die.
In Court Lord Keeper.

Whether after 40 Years poſſeſſion of a Copyhold under a Will, a Surrender to the Uſe of the Will ſhall not be preſumed.

THE Plaintiff having enjoyed a Copyhold for 40 Years under a Will, and having been admitted at the next Court after the Will made, came here to be relieved, and to have the Defect of a Surrender to the Uſe of the Will ſupplied, ſuch Surrender not being now to be found; as alſo the Defendant having brought a Writ of *Ayle* in the Court *Baron*, it was ſuggeſted in the Bill, that a Court *Baron* was not proper, by reaſon of the Difficulty, for the Tryal of ſuch an Action.

For the Plaintiff it was ſaid, it was a plain Equity, that after 40 Years Enjoyment, the defect of the Surrender ſhould be ſupplied, and cited the Caſe of *Griffith* and *Lloyd.*

The *Lord Keeper* was clear, that the want of a Surrender ſhould be ſupplied; Surrenders being kept by the Lord and his Stewards, who are oftentimes changed, and not ſo careful as they ſhould be; and therefore a Surrender might be loſt without the Default or Negligence of the Party; and he was about to have decreed the Land to the Plaintiff. But it being urged by the Defendant's Council, that in this Caſe they conteſted even the Will it ſelf, as well as the Surrender; and as to the Enjoyment, the Defendant was an Infant 18 Years of the 40, and they conceived the length of time ought not to be any bar to the Defendant's Right in this Caſe; for that by the *Stat'* of Limit. in a Writ of *Ayle* the Plaintiff may declare of Seiſin in his Anceſtor at any time within 50 Years. 32 *H.* 8.

Where-

Whereupon *Lord Keeper* decreed, the Defendant ſhould admit a Surrender, and directed an Iſſue, *Will or no Will*; but the Defendant's Council inſiſting that the pretended Teſtator was alſo *non Compos* (which as was ſaid ought to be pleaded ſpecially) they deſired, *Compos vel non*, might be the ſecond Iſſue. At laſt it was agreed, it ſhould be tried in a Ejectment, where the whole matter might come in Evidence, and the Plaintiff was not to inſiſt on his long Poſſeſſion.

In this Caſe were cited the following Caſes, *viz.* *Biden* verſus *Loveday*, 14 *Junij*, 11 *Car.* 1. where Leſſee had been 25 Years in Poſſeſſion, and the Leſſor would have avoided the Leaſe for want of Livery, this Court preſumed Livery, and decreed the Leſſee ſhould hold out during the continuance of his Leaſe, tho' after long poſſeſſion Courts at Law will preſume Livery. *Pencoſe* verſus *Trelawny*, 2 *Julij*, 35 *Car.* 2. where in regard the Plaintiff had 40 Years poſſeſſion of a *Piſcary*, the Court decreed the Defendants to ſurrender and releaſe their Title to the ſame, tho' the Surrender made by the Defendants Anceſtors was defective, and that the Plaintiffs ſhould hold and enjoy againſt the Defendants.

Ratcliffe verſus *Graves & al'.*

Caſe 193.
7 Novembris.
In Court Lord Keper.
2 Ch. Rep. 152.
A Surety not chargeable in Equity further than he can be by Law.

WALTER Ratcliff, Plaintiff's Father, having made his Will, and Plaintiff and his Brother *John* Executors and Reſiduary Legatees, and they being Infants at their Father's Death, Adminiſtration with the Will annexed during their Minority was granted to *Eliz. Ratcliff* their Mother; and the *Prerogative* Court upon granting the ſaid Adminiſtration took the uſual Bond from the Adminiſtratrix, in which the two Defendants the *Heathers* were bound, as her Sureties.

The Plaintiff's Brother being dead, and having made his Will and Plaintiff Executor, he now brought his Bill

for an Account of the Teſtator's perſonal Eſtate, and as to the Defendants the Sureties, it was ſuggeſted, that by *Fraud* and *Covin* they had got up their ſaid Bond, and had procured inſufficient Security to be accepted by the *Prerogative* Court in the Room thereof.

But the *Lord Keeper* upon the firſt opening of the Matter declared, he would not charge the Sureties further, than they were anſwerable at Law; and diſmiſſed the Bill as to that Part.

Another part of the Caſe was, that the ſaid Adminiſtratrix having had the Inteſtate's Eſtate long in her Hands, and Imployed the ſame in Trade, and received Intereſt for ſome Part thereof, It was prayed, that ſhe might anſwer Intereſt for it.

Executor ſhall anſwer Intereſt, if he has made any of the Teſtator's Eſtate.

The *Lord Keeper* was clear of Opinion, that ſhe ought to anſwer Intereſt for it; for he thought it reaſonable, that Executors in all Caſes ſhould anſwer Intereſt, if they had uſed the Mony in Trade, or received any Intereſt for it, and not turn the ſame to their own Private Advantage: the only Objection againſt it was, that if the Mony ſhould miſcarry, or be loſt, the Executor muſt ſtand to the Loſs of it: But now every one knows a Man may inſure his Mony for *One per Cent*; and therefore decreed, the Adminiſtratrix ſhould accompt for Intereſt, unleſs ſhe made Oath, that ſhe had kept the Mony by her: altho' it was urged, that the conſtant Practice of the Court had been otherwiſe for twenty Years paſt, and more; and that there were above 40 Precedents in the Caſe; and the Caſes of *Haſlewood* and *Baldwin*, and *Gardener* and *Cartwright* were cited, in which laſt Caſe it was fully in Proof, that the Executor had received Intereſt, and therefore it was Decreed, that he ſhould account for ſuch Intereſt as he had received; but this Decree was afterwards reverſed upon an Appeal to the *Houſe of Lords*. But notwithſtanding theſe *Precedents* it was decreed *prout ſupra*.

Caſe 194. 10 Novembris. *In Court Lord Keeper.*

Charles Weſt Eſq; verſus *Lord Delaware* and Sir *John Cutler.*

A Father on the Marriage of his Son articles to ſettle a Jointure on the Wife, and her Iſſue, but no Proviſion is made for the Son during his Life.

The Father has the Portion, and the Wife dies without Iſſue

Whether the Son is intitled to any Eſtate in the Lands.

THE Plaintiff being the Son and Heir of the Defendant the Lord *Delaware*; there were Articles made on the Marriage of the Plaintiff with one Mrs. *Huddleſton*; whereby the Lord *Delaware*, in Conſideration of 10000 *l.* Portion to be paid or ſecured unto him by Mr. *Huddleſton*, covenants with Mr. *Huddleſton* to ſettle on his Daughter 800 *l. per Ann.* for her preſent Maintenance and Jointure, and 400 *l. per Ann.* more after the Death of his Lordſhip's Mother, Remainder to her Iſſue, and that after his Deceaſe he would make up the 1200 *l. per Ann.* 3000 *l. per Ann.* and that was to be ſettled on her Iſſue, and there was a Clauſe in the Articles, that Mr. *Weſt* ſhould have power to ſell 100 *l. per Ann.* of the Premiſſes.

Mrs. *Huddleſton* dyes after Marriage without Iſſue, before the Portion paid, or any Settlement made. Afterwards the Lord *Delaware* has a Decree for the *Ten thouſand Pounds* Portion, but by Compromiſe accepts of 6000 *l.* which his Lordſhip receives; but refuſes to make any Settlement on his Son.

The Bill was to be reliev'd touching theſe Articles, and to have an Execution of them according to the Meaning of the Parties and an Equitable Conſtruction.

For the Plaintiff it was inſiſted, that altho' by the Letter of the Articles there is no Agreement for ſettling any Eſtate upon the Son, yet it is ſtrongly implyed; and the Intent of the Parties can't be preſumed to be otherwiſe: and if theſe Articles had been carryed to any Lawyer to have drawn a Settlement in purſuance of them, no one will ſay, but they would have limitted an Eſtate for Life to Mr. *Weſt*.

Firſt, It was urged, that the Word *Junctura,* Jointure, *ex vi termini,* implyes an Eſtate for Life to the Husband.

Secondly, That the Portion was a Conſideration moving from Mr. *Weſt,* and ſuch a Conſideration as would make him a Purchaſor.

Thirdly, That it would be a moſt unnatural Expoſition of the Articles, to ſay the whole Eſtate ſhould be limitted to the Wife, and nothing to the Son, and thereby to make the Son beholden to his Wife for Maintenance out of his own Eſtate.

Fourthly, That it is impoſſible to draw a Conveyance exactly purſuant to the Letter of the Articles, for in Caſe the Lord *Delaware* had dyed in the Life-time of Mr. *Weſt* his Son, the Contingent Remainders to the Iſſue had been deſtroyed.

But for the Lord *Delaware* it was inſiſted, and ſo he had ſworn in his Anſwer, that the Articles were made according to the Agreement, and that they were ſo Penn'd on purpoſe, that if his Son's Wife ſhould die without Iſſue, the Eſtate might revert to him again, and he might have his Son in his Power, as to a ſecond Match.

After long Debate the Lord *Keeper* told them, that each of them were unreaſonable, and held too faſt; that on one ſide it was too much to ask all the Eſtate; for that the Lord *Delaware* had but 6000*l.* of the Portion: And on the other hand it was too hard for the Lord *Delaware* to refuſe to make any Settlement at all: But he adviſed them to end the Matter by Compromiſe, and propoſed it ſhould ſtand referr'd to the *Attorney General* and Sir *Francis Pemberton.*

Goodwin

Case 195.
13 Novembris.
In Court Lord Keeper.

Goodwin versus *Ramsden.*

A Man dies Intestate within the Province of *York*, all his Children being advanced in his Life-time.
His personal Estate shall be distributed according to the Statute of Distributions.

THE Plaintiff's Bill was to have an Accompt, and her Share of her Father's personal Estate, who died Intestate.

The Defendant pleaded, that the Estate in Question lay within the Province of *York*, and that the Intestate died there, and that the Plaintiff, being one of his Daughters, was advanced by him in his Life-time; and that by the Custom of the Province of *York*, a Daughter, being once advanced by her Father in his Life-time, was excluded from all further Benefit of her Father's personal Estate.

But in this Case, it appearing that all the Children of the Intestate were advanced by him in his Life-time, and so the Estate wholly exempted out of the Custom of the Province of *York*, it ought to go now in a Course of Administration, and be distributed according to the Act for settling Intestates Estates; and thereupon the Plea was over-ruled.

Case 196.
Eodem die.
In Court Lord Keeper.

Day and *Ux'* versus *Chapfeild.*

If an Executor dies before Probate of the Will, his Executor cannot prove it; but Administration *cum Testamento, &c.* must be granted to the Residuary Legatee, (if any) or to the next of Kin.

WHERE an Executor dyes before Probate of a Will, his Executor cannot take upon him to prove that Will, but Administration ought to be granted with the Will annext to the Residuary Legatee, if there be any, or else to the next of Kin, according to the Resolution in *Ifted*'s Case, in *Dyer* fo. 372.

Moore

Moore verſus *Hart.*

Caſe 197.
14 Novembris.
In Court Lord Keeper.
Ante Caſe 100.

THE Bill was to have an Execution of a Marriage Agreement, ſetting forth, that the Defendant had made great Application to the Plaintiff's Friends and Relations, that the Plaintiff might become a Suitor to his Daughter, and at firſt promiſed to give his Daughter 3000 *l*; but the Defendant afterwards finding the Plaintiff's Affection ſettled upon his Daughter, receded from his Promiſe, and then pretended he could not give her ſo much; and thereupon on the 6th of *Jan.* 1680, a Letter was wrote by one Mr. *Reeve*, a Relation of the Plaintiff's, to the Defendant *Hart*, deſiring him to be plain, what he would give down with his Daughter. In Anſwer to which Letter the Defendant on the 10th of the ſame Month wrote to Mr. *Reeve*, acknowledging the Deſerts of the Plaintiff beyond his the Defendant's Ability, and adds further, you deſire me to be clear, and ſay what I will lay down upon the Nail; to which, if you mean in ready Money, my Eſtate lying in Land, I can ſay but little; but if it be, to ſay, what I will give my Daughter at the preſent, I ſay with all plainneſs 1500 *l.* in Land, either at *Creaton* or *Wapnam:* But if our difference in the Value of the Land will make Mony more acceptable, I will give the ſame Sum in Mony out of the Moneys to be raiſed by Sale of *Creaton*, *&c.* And further ſetting forth, that in Confidence of this Promiſe and Agreement, the Plaintiff married the Defendant's Daughter, whereby ſhe would be intitled to Dower, the Plaintiff's Eſtate being 500 *l. per Ann.* in Poſſeſſion, and as much more in Reverſion; and therefore to have the ſaid Promiſe made good, and the Land ſtand charged with the 1500 *l.* Portion, according to the Agreement, was the Bill.

The Defendant *Hart* had formerly pleaded the Act of *Frauds* and *Perjuries*, but that was over-ruled by Mr. *Juſtice Charlton*;

Charlton; and the Defendant now by Anſwer inſiſted on the Benefit of that Act of Parliament, and further ſet forth that after his Letter of the 10th of *Jan.* Mr. *Reeve* wrote another Letter to him to this Effect, *viz.* that ſince the Defendant reſolved not to be obliged to give 500 *l.* more at his Death, he left the Defendant and the Affair as he found it, *&c.* And the Defendant ſaid further, that he look'd upon this Letter to be an abſolute Waver of the Treaty, and did not anſwer it, or after that time treat further with Mr. *Reeve* or any other touching the Marriage; but renewed a former Treaty concerning his Daughter's Marriage with one Mr. *Hart*, who had 6 or 700 *l. per Ann.* and offered to Settle 200 *l. per Ann.* on her: But that before his Daughter returned home from Mr. *Reeve's* Houſe, where ſhe had been, the Marriage with the Plaintiff was had, without the Defendant's Conſent or Privity; and inſiſted that all former Propoſals were abſolutely waved by Mr. *Reeve's* laſt Letter; and that if the Plaintiff had any Demands againſt the Defendant, he ought to take his Remedy at Law; and denied he ever treated about the ſaid Marriage, or made any Promiſe concerning the Marriage Portion, after that laſt Letter of Mr. *Reeve's*; and inſiſted he ought not to be charged.

But it being fully in Proof, that the Defendant *Hart*, upon the Receipt of Mr. *Reeve's* laſt Letter, came up to Town purpoſely about this Match, and declared before ſeveral Witneſſes not above two Days before this Marriage, that he would make his Promiſe good upon the Word of a *Prieſt*, and under bitter Imprecations, that if he did not do it, he and his Poſterity might periſh, *&c.* And Mr. *Reeve* likewiſe depoſing, that he never communicated ~~the Defendant's~~ his laſt Letter to the Plaintiff, but that the ſame was wrote without his Privity or Knowledge, the Court decreed the Defendant to pay the Plaintiff the 1500 *l.* Portion, and that the Lands at *Creaton* and *Wapnam* ſhould ſtand charged with the Payment of it; and that the Plaintiff ſhould ſettle 300 *l. per Ann.* Jointure on his Wife: Tho' for the Defendant it was urged, that this Promiſe in Writing

Writing being discharged by a subsequent Letter in writing, it could not now be revived by Parol Discourses.

It was also objected, that the Plaintiff had good Remedy at Law; but it was answered, he was proper in Equity to charge the Lands with the Mony by Vertue of the Agreement.

Comes Raneleigh versus *Thornehill.*

Case 198.
17 Novembris.
In Court Lord Keeper.
A Bill may be brought for Sollicitor's Fees only, if for Business done in this Court. And so it may, where the Business is done in another Court, if it relates to another Demand made by Plaintiff in this Court.

IN a Bill of Review it was assigned for Error, that the Defendant, who was a Sollicitor, had a Decree for his Fees, for which he ought to sue at Law. *Sed non allocatur.* A Man may have a Bill for Sollicitor's Fees only, if for business done in this Court: And so he may, where the business is done in another Court, if it relates to another Demand, the Plaintiff makes in this Court.

Carpenter versus *Bennet.*

Case 199.
Eodem die.
In Court
A Man indebted 700 *l.* agrees on his Marriage to settle Lands of 100 *l.* a Year on himself for Life, then to the Wife for her Jointure, Remainder in tail upon their Issue.
Decreed the Land to be sold to pay the 700 *l.* and the Surplus of the Mony to be laid out and settled on the Wife and the Issue. But this Decree reversed on a Bill of Review.

A Man upon his Marriage having agreed to settle his Lands, being 100 *l. per Ann.* upon himself for Life, Remainder on his Wife for her Jointure, the Remainder in tail upon their Issue: And it appearing in the Cause that the Husband had then contracted a Debt of 700 *l.* It was decreed the Land should be sold, the Husband's Debt be first paid, and the Residue of the Mony laid out in a Purchase of Lands to be settled on the Wife and her Children.

And a Bill of Review being brought to reverse this Decree, it was assigned for Error, that the Husband had not a sufficient Allowance made him for his Interest in the Premisses, and that this being all his Estate, he ought in Equity to have had some Provision made him out of the Estate, which was decreed to be purchased, for his Maintenance. And

And for these Reasons the *Lord Keeper* reversed the Decree, saying, it was hard to compel a Man to sell his Estate for Life for seven Years Purchase: And it was likewise hard the Wife should not allow her Husband Maintenance.

Case 200.

Hincks versus *Nelthrope.*

Bill to establish an Agreement for a Separate Maintenance. To such part as prayed a Discovery of hard Usage, Defendant demurred. Demurrer allowed.

THE Bill was to establish an Agreement for a Separate Maintenance for the Defendant's Wife. And (amongst other things) prayed a Discovery of several unkindnesses and hardships which the Defendant, as it was pretended, had used towards his Wife to make her recede from this Agreement. To which Discovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court; and the Demurrer was allowed.

Case 201.

Lady Poulet versus *Lord Poulet.*

24 Novembris.

In Court Lord Keeper.

2 *Vent.* 366.

Term limitted by a Settlement to raise Portions for younger Children payable at 21 or Marriage.

One of them dies under 21 and unmarried.

Her Portion shall not be raised for the benefit of the Administratrix. Otherwise it the Portion was to be raised out of a personal Estate

THE *Lord Poulet*, the Defendant's Father, by Settlement limitted a Term to Tustees for the raising of 4000 *l.* apeice for his younger Children for their Portions, to be paid them at their respective Marriages or Ages of One and twenty Years, which should first happen; and for paying unto them 100 *l. per Ann.* Maintenance in the mean time; and after these Portions and Maintenance raised, then the Residue of the Term was to be in Trust for his Heir the Defendant.

The said *Lord Poulet* having two Daughters by the Plaintiff his Second Wife, *viz. Vere* and *Susanna*, makes his Will, and thereby gives to his said Daughters 4000 *l.* apeice for their respective Portions, to be raised and paid them in such Manner as by the said Settlement is directed; but declares, they should have but one 4000 *l.* apeice, and not

not two by the Settlement and Will, unleſs the Defendant his Son ſhould die without Iſſue; in which Caſe he deviſed, that they ſhould have 2000*l.* apeice more, to be paid in the ſame Manner as the 4000*l.*

Vere, one of the Daughters, dyed being about 8 Years of Age. The *Lady Poulet* the Mother takes Letters of Adminiſtration to her Daughter *Vere*, and exhibits a Bill againſt the Truſtees and the *Lord Poulet* the Heir at Law, to have her ſaid Daughter's Portion of 4000*l.* raiſed and paid.

In this Caſe the Queſtion was, Whether the 4000*l.* Portion of Mrs. *Vere Poulet* the Daughter did ceaſe by her Death, or ſhould be raiſed for the Benefit of her Adminiſtratrix.

Lord Keeper ſaid, this was a very hard Demand in Equity; for a Joyntreſs, who had already the Proviſion intended her on her Marriage, and was before a Stranger in the Family, to go away with this 4000*l.* and neither the Heir nor Younger Children benefitted by it, ſhe being not to make any Diſtribution.

If the 4000*l.* had been to have been raiſed out of the Perſonal Eſtate, it had been clear, the Plaintiff muſt have had it; but being here a Charge upon the Eſtate of the Heir, he would conſider of the Caſe, and adviſe with the Judges about it.

Note, This Bill was diſmiſſed 13th *May* 1685, and afterwards upon an Appeal to the Houſe of *Lords* the Decree of Diſmiſſion was affirmed.

Coleby verſus *Smith.*

Caſe 202.

6 Decembris.

In Court. Lord Keeper.

THE Bill was brought by *Coleby* the Plaintiff to be relieved againſt a Purchaſe made by the Defendant *Smith & al'* from the Plaintiff's Father, ſuggeſting that he had been circumvented and impoſed upon by the Defendants.

Articles, and a Conveyance and Fine in purſuance thereof, ſet aſide for Fraud.

The Defendants inſiſted on their Purchaſe; and in this Caſe it appeared, that there were at firſt Articles for the Purchaſe under Hand and Seal, and ſome time after that a Conveyance actually made and executed in Purſuance of theſe Articles, and the Purchaſe Mony was all paid or ſecured; and after all this a Fine levyed by *Coleby* the Father to the Purchaſor, and *Coleby* writes a Letter to his Tenants to attorne: And becauſe *Coleby* the Son, the now Plaintiff, ſhowed himſelf diſcontented at this Purchaſe, and would have obſtructed it, *Coleby* the Father takes a Releaſe from his Son of all his Right to theſe Lands; Which Releaſe was proved to be ſo taken with an Intent to eſtabliſh this Purchaſe.

Upon the hearing of this Cauſe the *Lord Keeper* ſet this Purchaſe aſide, becauſe there appeared to be ſome Art uſed to perſuade *Coleby* the Father to ſell theſe Lands, *viz.* They perſuaded him (he being almoſt in his Dotage) that they could help him to a great Match, and told him, that to qualify himſelf for the Lady, it was neceſſary he ſhould convert all his Land into Mony; which ſhewed the Man was purely Impoſed upon; for here he ſells his Land, when he does not want Mony, and ſells it to thoſe, who had no Mony to buy, but were to borrow; and he is to receive his Mony by Inſtallments; and when the whole is received, it is much leſs than the Real Value, and the Defendants in a very little time might have paid the Purchaſe-mony out of the Profits: And beſides, the Defendants never own to him, that they were to be the Purchaſors, but drive on the Bargain in one Mr. *Ewre*'s Name, and a Letter is wrote by one of the Confederates, as from Mr. *Ewre*, that he muſt reſolve quickly what he would do: and that Mr. *Ewre* would admit of no longer delay in the Matter, *&c* And for theſe Reaſons the *Lord Keeper* ſet aſide this Purchaſe.

Tho' *Note*, it was proved, that *Coleby* the Father was a ſenſible Man and capable of managing his own Buſineſs,

and had not any apparent Weakneſs upon him; and that he was abſolute Owner of this Eſtate, and might have given it away: And it was likewiſe proved, that after he had conveyed away the Land, he declared if it were then to do, he would do it again.

Childerns verſus *Saxby.*

Caſe 203.
6 Decembris.
In Court Lord Keeper.

Bayliffs, who had ſerved an Execution in Breach of an Injunction, find Money hid in the Houſe, and carry it away. Party, at whoſe Suit the Execution was taken out, ordered to make Satisfaction.

THE Defendants having taken out Execution in Breach of an Injunction of this Court, and ſome of the Bayliffs, who ſerved the Execution, having, as was alledged, found out a place in a Wall in the Plaintiff's Houſe, that was made up again with Bricks, wherein was hid 150 *l.* and having taken away the Mony, and done great Spoil to the Plaintiff's Goods, an Order was made by the late *Lord Chancellor,* that the Defendants ſhould make good this Mony to the Plaintiff, and ſhould ſatisfie all other Damage which the Plaintiff would ſwear he had ſuſtained.

And now this Matter came before the *Lord Keeper*, and the Defendants complained of this Order as unjuſt, and without Precedent; the moſt that has been ever done in this Court in any ſuch Caſe, was only to put the Parties accuſed to purge themſelves on Oath; but here by this Order the Plaintiff was to be the Judge of his own Damage: And that the Defendants came into Poſſeſſion by Courſe of Law, and the Bayliffs were legal Officers: If they did any thing amiſs, the Party ought to take his Remedy at Law againſt them, and the Plaintiff ought not to be anſwerable for their Miſdemeanours.

In *Odium Spoliatoris*, the Oath of the injured Party ſufficient to charge the wrong Doer.

But the *Lord Keeper* held the Order to be juſt; and he thought it an idle Practice in the Court to put a Thief to his Oath to accuſe himſelf; for he that has ſtolen, will not ſtick to forſwear it; and therefore in *Odium Spoliatoris* the Oath of the Party injured ſhould be a good Charge upon

upon him that has done the Wrong: and Confirmed the former Order.

Caſe 204.

Eodem die.

In Court Lord Keeper.

Potts verſus *Potts.*

It is ſufficient for a Servant or Apprentice to ſay in his Anſwer in general, that what he received for his Maſter was laid out again by his Order.

ON Exceptions to a Maſter's Report, which had reported the Defendant's Anſwer inſufficient, the *Lord Keeper* declared, that it was ſufficient for a Servant or Apprentice in anſwer to a Bill for an Account, to ſay in general, that whatever he received, was by him received and laid out again by his Maſter's Order.

Vid. ante Caſe 81 & 127.

Caſe 205.

Vid. ante Caſe 142.

The Caſe of Alderman *Backwell's* Creditors.

Commiſſion of Bankruptcy ſuperſeded by the Conſent of the petitioning Creditors, refuſed to be revived upon the Application of other Creditors, who had not come in, but deſired ſo to do.

SOME of Alderman *Backwell's* Creditors having upon a Petition to the *Lord Keeper* obtained a Commiſſion of Bankruptcy againſt him, the Commiſſioners ſat and found him a Bankrupt, and made an Aſſignment, and then Alderman *Backwell* dies in *Holland.* His Son and Heir agrees with all the Creditors, who had Petitioned for this Commiſſion, and thereupon obtains a *Superſedeas*; afterwards the other Creditors hearing of it, they Petition the *Lord Keeper* to grant a *Procedendo,* becauſe a Commiſſion being once granted, and an Aſſignment made, that was a Truſt for all the Creditors of Alderman *Backwell,* that ſhould come in within the *four* Months, which they intended to do, and inſiſted that the Commiſſion could not be regularly diſcharged, till after the four Months were paſt; and tho' it had been ſometimes done in other Caſes, yet that was where the Creditors might have the ſame Benefit by a new Commiſſion; but in this Caſe the Bankrupt being dead, if this Commiſſion ſhould ſtand Superſeded, the Creditors were without Remedy; and inſiſted this was a Fraud and Contrivance betwixt the Heir and the other Creditors to defeat them of their juſt Debts, and ought not to be Countenanced in Equity: And that they

they relyed upon it, that they might at any time within the *four* Months have come in, and have had the Benefit of this Commiſſion, otherwiſe they themſelves would have petitioned for a Commiſſion againſt him.

But the *Lord Keeper* declared, that in any Caſe, where all the Creditors that Petitioned for a Commiſſion, would afterwards agree to have it diſcharged, he would never ſcruple to diſcharge that Commiſſion; and in this Caſe mentioned how inconvenient it would be to revive the Commiſſion; for Alderman *Backwell* had Traded conſiderably ſince ſuch time as the Commiſſioners had found him a Bankrupt, and that all the Compoſition-mony that his Son had paid to his Father's Creditors muſt be refunded, and that many other Inconveniencies would enſue; and that he had all along determined with himſelf not to revoke this *Superſedeas*, but had deliberated upon it, that the other Creditors might make the beſt Terms they could with the Heir, and when they have been fairly offered, if they ſtood in their own light, they muſt blame themſelves for it: And declared, he would not revoke the *Superſedeas*, nor grant a *Procedendo*.

Carneſew verſus *Arſcott*.

Caſe 206.

15 Decembris. *In Court Lord Keeper.*

ON a Demurrer to a Bill of Review, the Caſe was; the Plaintiff had granted an Annuity out of certain Lands in *Cornwall* to the Defendant, with a Clauſe of Diſtreſs and *nomine pœnæ*, and a Power to enter and detain till he was ſatisfied all Rent in Arrear, and the *nomine pœnæ*. The Annuitant exhibits a Bill, ſuggeſting that there was no Diſtreſs to be found upon the Land, but that it lay Waſte, and that if he ſhould enter, he could make no Profit thereof by reaſon the Land was covered with ſome old Incumbrances, and his Stock would be ſwept away; and the Annuity being redeemable on Payment of a Sum of Mony, he pray'd the Defendant might be abſolutely

An Annuity is granted out of Lands, and made redeemable on Payment of a Sum of Mony.

The Grantor cannot be foreclosed of the Land, tho' he may of the Redemption of the Annuity.

foreclosed, even of the Land it self; and it was so decreed *ex Parte* by the Lord *Chancellor Nottingham.*

And now it was assigned for Error by the Plaintiff, in the Bill of Review, that he ought not to be foreclosed of the Land it self; but at most could be only foreclosed from redeeming the Annuity; and that the *nomine pœnæ's* should run upon him; and of that Opinion was the *Lord Keeper,* and therefore reversed the Decree.

Heighter versus *Sturman.*

Case 207.
15 Decembris,
In Court Lord Keeper.

Administratrix and her two Children, intituled to a Lease of a House, agreed by Parol to make a Lease thereof to *J. S.*

The Administratrix executes the Lease.

Upon a Bill to compel the other two to join, they can't plead the Statute of *Frauds,* &c.

AN Administratrix and her two Children being Intitled to a Lease of a House, they all three agree to make the Plaintiff a Lease for *Ten* Years at a certain Rent. The Administratrix with the Privity of the other two having executed such Lease; the Bill was to compel the other two to execute the same likewise.

The Defendants pleaded the Statute of *Frauds* and *Perjuries*; the Agreement made with them not being reduced into Writing.

But the *Lord Keeper* over-ruled the Plea, and held that the Administratrix having executed the Lease, this Case was out of the Statute.

Case 208.

Sewell versus *Musson.*

A Creditor agrees to take less than his Debt, so as the Money is paid at a certain Day; and the Mony not being paid at the Day, he Sues for the whole.

Debtor not relievable.

A Creditor having agreed with his Debtor to take a Sum of Mony less than his Debt, so as it was paid precisely by such a Day; he fails of Payment, and now brings his Bill, suggesting some equitable Excuses, why he did not pay precisely at the Day; and that he tendered the Money within a Day or two afterwards, and that the Defendant refused to accept it, and Sued for the whole at Law.

To this the Defendant demurred, for that the Bill contained no Equity: and inſiſted, that when he made an Agreement in favour of the Plaintiff, he might reſtrain and qualify it, as he thought fit; and that the Plaintiff having failed of Payment at the Day, the Defendant was not now bound by the Agreement, or obliged to take leſs than his juſt Debt.

Lord Keeper allowed the Demurrer, and ſaid, *Cujus eſt dare ejus eſt diſponere.*

DE
Termino S. Hillarii,

35 & 36 *Car' II.* 1683.

In Curia Cancellariæ

Stephens versus Dr. *Berry.*

Case 209.

15 Januarii. *In Court Lord Keeper.*

The Chancellor's Court in *Oxford* hath not Jurisdiction of Matters of Freehold.

THE Plaintiff exhibits his Bill to be relieved touching some Lands in *Cornwall*, and the Defendant being Head of *Exeter* College in *Oxford*, pleads the Privilege of the University of *Oxford*, and that he ought to be Sued in the *Vice-Chancellor*'s Court in *Oxford* only.

But his Plea was over-ruled; for that Matters of Freehold are excepted out of the Patent to the University, and their Court can at best have but a lame Jurisdiction, as to Lands in *Cornwall.*

Stapleton versus *Sherrard.*

Case 210.

Eodem die.

Bill to discover who is Tenant of the Freehold, in order to bring a *Formedon*, will not lye.

THE Bill sets forth that the Plaintiff was intitled to certain Lands, as Remainder Man in Tail, and prays a Discovery, who was the Tenant of the Freehold, that he might know against whom to bring his *Formedon.*

Vid. post Case 271.

To this the Defendant pleaded a *Fine* and *Non-claim* in Bar, and likewise demurred.

The

The *Lord Keeper* inclined that the Demurrer was good; for that one ſhall not have a Bill here in any Caſe to diſcover a Tenant to the *Præcipe*, for there are ways to know it without; tho' the Caſe of *Bickerton* and *Bickerton* was cited, where ſuch a Demurrer was diſallowed. But the Matter in the Principal Caſe went off upon the Plea, which was allowed to be good: For tho' after the Fine levied the Plaintiff had made his Entry, yet that would not do; the Fine being levied by Tenant in Tail, which made a diſcontinuance of the Eſtate, and therefore the Plaintiff muſt make his Claim by Action.

Entry of Remainder Man, within five Years after a Fine levied by Tenant in Tail will not ſave his Right; for the Fine being a Diſcontinuance, he ought to make his Claim by Action.

Afterwards the Matter of this Demurrer coming on to be argued again on the 5th of *February* following, the Demurrer was allowed to be good.

Brend verſus *Brend.*

Caſe 211.

Eodem die.

2 Ch. Rep. 161.

A Man marries a Jointreſs of Houſes, which are burnt down, and they borrow 1500 *l.* to rebuild, and levy a Fine *ſur conceſs.* and by Deed between the Husband and Conuſee the Equity of Redemption is reſerved to the Husband and his Heirs; he lays out 3000 *l.* in Building, and dies.

Decreed the Wife and not the Heir to redeem.

UPON a Demurrer to a Bill of *Review*, the Caſe was thus. The Defendant had a Jointure in ſome Houſes in *London* before the Fire, of 100 *l. per Ann.* The Houſes are burnt down, and then the Wife and Husband borrow 1500 *l.* to build upon the Ground, and levy a Fine *ſur conceſs.* for 99 Years, if the Wife lived ſo long, and a Deed is made between the Conuſee and the Husband, wherein the Husband covenants to repay the Mortgage-money with Intereſt: And the Equity of Redemption is limitted to the Husband and his Heirs, but the Wife is no Party to this Deed: The Husband expends 3 or 4000 *l.* in building upon this Ground, and dies; the Queſtion was, whether the Jointreſs or the Heir of the Husband ſhould redeem. The *Lord Chancellor Nottingham* had decreed it to the Wife, and now upon arguing the Demurrer, the *Lord Keeper* was of the ſame Opinion; for that the Wife was no Party to the Deed of Redemiſe, by which the Redemption was limitted to the Husband; and the Wife being a Jointreſs, and having granted a Term for

Years only out of her Eſtate for Life, there reſts a Reverſion in her, which naturally attracts the Redemption; and ſaid, if the Cauſe had come originally before him, and there had been Aſſets ſufficient, the Husband having Covenanted to pay this Mony, he would have decreed it clear to the Wife: It was as little as a Husband could reaſonably do, to rebuild the Houſes, and put his Wife's Jointure in as good Plight, as it was before: And therefore allowed the Demurrer to the Bill of Review.

See the next Caſe.

In this Caſe a Debate aroſe touching the ſtating of the Matters of Fact in a Decree, and it was complained, that the *Regiſters* now drew up Decrees in ſuch a manner, as that no Bill of *Review* could be brought; for they only recite the Bill and Anſwer, and then add, that upon the reading of the Proofs, and hearing what was alledged on either Side, it was decreed ſo and ſo; and never mention what particular Facts were allowed by the Court to be ſufficiently proved, and what not; that ſo upon a Bill of *Review* it might appear to the Court upon what Facts the Decree was grounded.

The *Lord Keeper* declared, he would not allow of that way of drawing up Decrees in general; but that the Facts that were proved, and allowed by the Court as proved, ſhould be particularly ſo mentioned in the Decree; otherwiſe, if a Bill of *Review* was brought, thoſe Facts ſhould be taken as not proved. For elſe a Decree could never be reverſed by a Bill of *Review*, but all erroneous Decrees muſt be reverſed upon *Appeals*.

Caſe 212.

Bonham verſus *Newcomb.*

25 Januarii.

In Court Lord Keeper.

Ante Caſe 6.

Poſt Caſe 227.

THIS Caſe came now before the Court upon a Demurrer to a Bill of Review to reverſe a Decree made in this Cauſe by the *Lord Chancellor Nottingham*: And the Error aſſigned was, that the Defendant *Newcomb* ought

ought not to be admitted to a Redemption againſt his Expreſs Agreement in the Mortgage-deed to redeem within a certain Time, or otherwiſe that the Eſtate ſhould be irredeemable.

It was argued for the Demurrer,

Firſt, That an Eſtate could not be a Mortgage at one time, and afterwards become an abſolute Purchaſe, by one and the ſame Deed.

Secondly, That the Mortgagee in this Caſe had a proper Remedy, and might have made his Eſtate abſolute in a legal Courſe, *viz.* by exhibiting a Bill to foreclose the Mortgagor of the Equity of Redemption: and they cited the Caſe of *Yeildmington* and *Gardiner*, where the Mortgagor was to redeem during Life *only*, and yet his Heir admitted to the Redemption; and Sir *Robert Jaſon*'s Caſe, where an Eſtate was to go to his Wife and her Heirs, unleſs a ſufficient Jointure were ſettled within ſuch a time limitted in the Deed, and the Caſe of *Howard* and *Harris*. *Ante Caſe* 31. & 191.

But as to that Caſe, it was anſwered, tho' there was a qualified Redemption, yet there was an Expreſs Covenant for Repayment of the Mortgage-mony, and ſo it was in the Power of the Mortgagee to make it a Mortgage at any time.

But the *Lord Keeper* inclined to reverſe the Decree, for that *modus & conventio vincunt legem*; and all Conditional Purchaſes or Bargains muſt not be turned into Mortgages: And ſaid, that where there is a Condition or Covenant, that is good and binding in Law, Equity will not take it away.

It was objected againſt the Bill of *Review*, that they had aſſigned Errors collected from the Proofs in

the Cauſe, that did not appear in the Body of the Decree.

See the laſt preceding Caſe

But the *Lord Keeper* obſerved, that was occaſioned by the ill Way they had got of late in drawing up Decrees in general, without particularly ſtating the matters of Fact: And ſaid the Plaintiff in a Bill of Review ſhould not be concluded by it; unleſs the Matter of Fact were particularly ſtated in the Decree.

At laſt it was agreed by the Council to wave the ſigning and inrolling the Decree by Conſent, and to hear the Cauſe again *de Integro*.

Civil verſus *Rich.*

Caſe 213.
29 Januarii.
In Court. Lord Keeper.
2 Ch. Rep. 160.

Real Eſtate ſettled by a Freeman of *London* on a Child no Bar to the Orphanage part, tho' ſuch Settlement declared by the Father to be a full Advancement.

THE Cuſtom of the City of *London* touching Orphans was certified to be; That where an Heir or Coheir had a real Eſtate ſettled on him by the Father, that the ſame was out of the Cuſtom of the City of *London*; and tho' the Father ſhould afterwards declare the ſame to be a full Advancement for ſuch Child, yet that was no Bar to his Orphanage part, neither was it to be brought into *Hotch-pot*; but was clearly out of the Cuſtom.

Ante Caſe 176.

A Child advanced in Marriage with a Portion is barred of the Orphanage Part, unleſs the Certainty of ſuch Portion appears by writing under the Father's hand.
Ante Caſe 78.

And it was ſaid, that by the Cuſtom of the City of *London*, where a Child is married with the Father's Conſent, and there is a Portion given in Marriage, ſuch Child is debarred from claiming any benefit of the Orphanage Part; unleſs the Father ſhall by writing under his Hand and Seal not only declare, that ſuch Child was not fully advanced, but likewiſe mention in certain, how much the Portion given in Marriage did amount unto; that ſo it may appear what Sum is to be brought into *Hotch-pot*.

Jeffereys verſus *Small.*

Caſe 214.
Eodem die.
In Court Lord Keeper.

TWO Perſons having jointly ſtock'd a Farm, and Occupyed it as Joint-tenants, the Bill was to be reliev'd againſt Survivorſhip, one of them being dead: And tho' it was proved in the Cauſe, that the deceaſed was informed, what the Conſequence of Law was in Caſe he ſhould dye, and that he thereupon replyed, he was content the Stock ſhould Survive; yet the Lord *Keeper* was clear of Opinion, that the Plaintiff ought to be relieved: and ſaid, if the Farm had been taken jointly by them, and proved a good Bargain, there the Survivor ſhould have had the benefit of it; but as to a Stock imployed in way of Trade, that ſhould in no caſe Survive. The Cuſtom of Merchants, as to Bills of Exchange, is now extended to Inland Bills; and the Cuſtom of Merchants, is extended to all Traders, to exclude Survivorſhip: and tho' it is common for Traders in Articles of Copartnerſhip to provide againſt Survivorſhip; yet that is more than is neceſſary: and he ſaid, he took the diſtinction to be, where two become Joint-tenants or jointly Intereſted in a thing by way of Gift or the like, there the ſame ſhall be ſubject to all the conſequences of Law; but as to a joint Undertaking in the way of Trade or the like, it is otherwiſe: and decreed for the Plaintiff accordingly.

Two Perſons Occupy and ſtock a Farm jointly.

There ſhall be no Survivorſhip.

But if two take a Leaſe jointly of a Farm, the Leaſe ſhall Survive.

Not neceſſary in Articles of Copartnerſhip to provide againſt Survivorſhip.

Where two are jointly intereſted by way of Gift, Survivorſhip takes place. Otherwiſe in a joint Undertaking in the way of Trade.

Domina Speake verſus *Domina Speake.*

Caſe 215.
Eodem die.
In Court Lord Keeper.

THE Bill was to have a Jointure, defective in Value, made good; the Husband having Covenanted, that the Lands ſettled for the Plaintiff's Jointure were 400 *l. per Ann.* whereas they were but 350 *l.*

The Defendant was decreed to perform the Covenant in *Specie*; but the Value of the Lands were to be Eſtimated,

A Man covenants, that Lands ſettled for a Jointure are of ſuch a Yearly Value. This relates only to the time of the Settlement, and not to the Death of the Husband.

as they were at the time of the Jointure ſettled, and not according to the preſent Value; Rents being now much fallen every where: but if the Covenant had been that they were of 400 *l. per Ann.* and ſhould ſo continue, then they ſhould have been made up full 400 *l. per Ann.* at this time.

Settlement for a Jointure is made in purſuance of Articles, and there is a Covenant in the Articles that the Lands are of ſuch a Yearly Value, but it is omitted in the Settlement. This Covenant doth ſubſiſt.

It was Objected for the Defendant, that this Covenant for the Value was only in the firſt Articles, and not in the Jointure Deed; and that therefore the Articles being Executed, and this Settlement of a Jointure, wherein there is no Covenant as to the Value, accepted as a Performance of the Articles, the Plaintiff ought not now to reſort back to the Covenant; and tho' this Settlement was made when the Plaintiff was an Infant and a Feme Covert, and ſo no Acceptance of hers could conclude her, yet it was accepted by her Father, with whom the Articles were made, and he tranſacted this whole Affair on her behalf. *Sed non allocatur.*

Hoby verſus *Hoby.*

Caſe 216.
Eodem die.
In Court Lord Keeper.
2 Ch. Rep. 160.
Equity will relieve againſt a fraudulent and partial Aſſignment of Dower by the Sheriff.

THE Bill was to be reliev'd againſt an Aſſignment of Dower by the Sheriff, which in the Bill was charged to be fraudulently done; there being aſſigned to the Defendant for her Dower, one full third part of the Lands, which amounted to 300 *l. per Ann.* and in this Third part there was a Cole-work, which One Year with another was worth 300 *l. per Ann.* beyond all Charges; and yet no Conſideration was had of it in the Aſſignment of this Dower: and it likewiſe appeared, that the Defendant's own Father was the only Perſon that on the behalf of the Infants the Children defended the Writ of Dower, and appeared to ſee the ſame ſet out, which look'd like a Colluſion: and the Plaintiff's Council offering, that the Defendant ſhould have one Intire Third both of Land and Coal-works, and that by way of a Rentcharge on the whole,

the Court ordered, ſhe ſhould accept thereof; or that otherwiſe a new Aſſignment of Dower ſhould be made: and ſhe took time to conſider of it.

Reeve verſus *Reeve.*

Caſe 217.
5 Februarii.
In Court Lord Keeper.

THE Caſe was, Sir *Richard Reeve* having Iſſue by a former Venter, by Deed charges his Lands at *Bickerton* for the Payment of 3000 *l.* Portion to his Daughter, and afterwards marries a ſecond Wife, and makes her a Jointure of a Moiety of theſe Lands at *Bickerton*, without taking notice of this Charge of 3000 *l.* He afterwards by his Will, thinking that this 3000 *l.* charged as aforeſaid would be good againſt the Jointure, takes notice thereof, and deviſes to his Wife other Lands in *Yorkſhire* in lieu of her Jointure in *Bickerton*, and dies.

A. charges Land in D. with a Portion for a Daughter by a firſt Venter, and then marries, and ſettles part of theſe Lands for the Jointure of a ſecond Wife, who has no Notice of the Charge.

A. believing the Portion would take Place of the Jointure, by Will gives ~~the~~ Lands in S. in lieu thereof.

The Wife and the Son and Heir agree together to defeat the Daughter of her 3000 *l.* Portion; and therefore the Wife finding that the Settlement, which was made on her Marriage, tho' ſubſequent in time, would yet prevail againſt this Charge of 3000 *l.* which was voluntary and fraudulent as to her, ſhe adheres to her Jointure, and refuſes to accept of the Deviſe. The Daughter's Bill is to be relieved.

The Wife by combination with the Heir refuſes to accept the Deviſe.

Decreed the Daughter ſhould hold the Lands in S. till her Portion was paid.

The *Lord Keeper* decreed, the Plaintiff ſhould hold ſuch Part of the Lands in *Yorkſhire*, as ſhould be equal in Value to ſuch of the Lands in *Bickerton* as were compriſed within the Jointure, until her Portion was raiſed.

Creſſet verſus *Kettleby.*

Caſe 218.
Eodem die.
In Court. Lord Keeper.

THE Bill was that the Plaintiff's Father by Settlement on his firſt Marriage was only Tenant for Life, or elſe Tenant in ſpecial tail, and the Plaintiff was the eldeſt Son of

When a Bill is in the Diſjunctive, the Defendant by his Plea may take it either way.

of that Marriage; and that the Defendant claimed by a ſubſequent Settlement, having notice of the firſt.

The Defendant pleaded a Fine levyed by the Father, and ſet forth her Title under the ſecond Settlement, and inſiſted ſhe was a Purchaſor, but did not plead ſhe had no Notice of the firſt Settlement.

Lord Keeper, the Bill being in the disjunctive, the Defendant might take it either way; and having pleaded a Fine, which is a Bar, ſuppoſing the Father to be Tenant in Tail, allowed the Plea.

Caſe 219. Eodem die. *In Court. Lord Keeper.*

Earl of Newburg verſus *Wren.*

After a Bill brought in the Exchequer to foreclose, the Defendants may bring a Bill in this Court to redeem, and the Pendency of the former Suit is not pleadable.

THE Plaintiff's Bill was to foreclose the Defendant, and the Defendant pleaded, that he had already exhibited a Bill againſt the now Plaintiff in the *Exchequer* to redeem, to which Bill the Defendant there (the now Plaintiff) had anſwered; and the ſubject matter of that Suit being the ſame with the Plaintiff's Bill in this Court, the Defendant pleaded the Pendency and Priority of the former Suit in the *Exchequer*, in Bar to the Plaintiff's Bill here.

And for the Plea it was argued by the *Sollicitor General* and others, that this Bill here was but in the nature of a *Croſs* Bill to that in the *Exchequer*, which the now Plaintiff might have exhibited there, and then one Account of the Profits would have ſerved for all, and it was vexatious in the Plaintiff to bring the ſame Matter in Iſſue in another Court at the ſame time: And if the *Deputy Remembrancer* in the *Exchequer* ſhould take the Account one way, and a *Maſter* here ſhould take it another, it would breed Confuſion: and if this Court ſhould be of an Opinion, that there ought to be no Redemption, and the *Exchequer* ſhould decree a Redemption, the Juriſdictions would claſh: And therefore to avoid theſe Inconveniencies

niencies Priority of Suit ought to give Juriſdiction to the *Exchequer*.

But the Lord *Keeper* over-ruled the Plea, and ſaid, this Court muſt deny Juſtice to none; and a Plaintiff has a Liberty to commence his Suit in what Court he thinks fit; and the *Chancery* was the *higheſt Court* of Equity: and tho' the *Exchequer* was an antient Court of Equity; yet the ſame was but a *private* Court, and its Juriſdiction properly was only for getting in the *King*'s Revenue, and for the *King*'s Officers; and they ought to keep within their proper bounds: and if there ſhould happen any of the Inconveniencies mentioned by Mr. *Sollicitor*, there are ſeveral Precedents, that Injunctions have gone to the *Exchequer* in ſuch Caſes.

Court of *Exchequer* a private Court, and it's proper Juriſdiction concerns only the King's Revenue and the King's Officers.

This Court has ſent Injunctions to the Court of *Exchequer*.

And the Plaintiff's Council urged the Caſe was much ſtronger, for the Defendant *Wrenn* had bought one *Doyly*'s Title, and *Doyly*'s Title was from one *Ball*, who had formerly exhibited his Bill to redeem in this Court, and upon hearing his Bill was diſmiſs'd; ſo that in truth this Court was firſt poſſeſſed of the Cauſe, and this Diſmiſſion was afterwards Pleaded in the *Exchequer*, and *Doyly* was privy to it, but the Court of *Exchequer* diſallow'd the Plea.

Lord Keeper declared his Opinion to be, that in any Caſe if the Mortgagor exhibited a Bill to redeem in the *Exchequer*, that the Defendant there ſhould be at Liberty to exhibit a Bill to foreclоſe in this Court: and over-rul'd the Plea, and order'd the Defendant to pay Coſts.

Sir *Jo. Lowther* verſus *Carill.*

Caſe 220.
Eodem die.

In Court Lord Keeper.

THE Defendant having agreed to purchaſe a Leaſe of the Plaintiff, the Leaſe was drawn and ſome Alterations made in it by the Defendant's Council, and it was afterwards Ingroſſed and ſent down into the Country to

A agrees by parol with *B* for a Leaſe which is drawn, and then peruſed

and corrected by *A*'s Council, and afterwards Ingroſſed and executed by *B*. Whether this is within the the Statute of *Frauds* as to *A*.

the Plaintiff to be executed, who accordingly executed the ſame: But the Leaſe not being return'd within the time agreed on, but kept in the Country *three* Months longer than it ought to have been, and the Defendant upon enquiry finding ſhe was to pay too much for this Leaſe, when the Deed was returned, ſhe refus'd to accept it, or to Execute a Counter part. The Plaintiff's Bill was to compell her to it.

The Defendant Pleaded in Bar the Act of *Frauds* and *Perjuries*, and that ſhe had not ſign'd any Agreement in Writing.

And for the Defendant it was ſtrongly inſiſted, that by the Letter and Meaning of the Act of Parliament the Defendant ought not to be bound by this Agreement, ſhe or her Agent having not ſign'd the ſame; and tho' Sir *Jo. Lowther* had executed the Leaſe on his Part, yet the Defendant ought not to be bound, the Words of the Act being that the Agreement muſt be ſign'd by the Party that is to be bound by it.

Lord Keeper order'd the Defendant to Anſwer, and to ſave the benefit of the Plea to the hearing.

Hayward verſus *Angell.*

Caſe 221.
6 Februar.

In Court Lord Keeper.

Portions given by Will to three Daughters, upon Condition they releaſed certain Lands to the Heir; one dies without Releaſing. Whether the Portions of the other Daughters ſhall be paid.

UPON a Demurrer to a Bill of *Review* upon a Decree made by the Lord *Chancellor Nottingham*, the Error aſſigned was, That the Defendant's Wife's Father having given Portions to his Daughters, in caſe they ſhould releaſe to his Heir their Right to certain Lands, one of the Daughters happened to dye before ſhe had given any ſuch Releaſe, and therefore the Heir refus'd to pay the Portions; and thereupon the other Daughters having exhibited their Bill to be reliev'd, they were diſmiſſed; whereas the Portion was *two thouſand* Pounds to each Daughter,

Daughter, and the Land to be Releas'd was not worth 500*l.* and the Performance of the Condition was prevented by the Act of *God*.

For the Demurrer it was argu'd, that this was a Condition precedent, and being not performed there could be no Releif; and cited *Fry* and *Porter*'s Case, and that this Case was much ſtronger than that; for the Words are, *if his Daughters ſhould Releaſe then he appointed them ſuch and ſuch Portions upon Condition they ſhould Releaſe, &c.* ſo that the Condition was double; and is as full as can poſſibly be Penn'd, to exclude the Daughters from all benefit of their Portions, unleſs they ſhould Releaſe: and Serjeant *Maynard* would have it to be ſtronger than an Ordinary Condition Precedent, it being, If they ſhould Releaſe then he gave *&c.* and ſaid, there was a difference between a Condition in the giving a Portion, and a Portion given upon Condition; for in the former Caſe the Portion does never ariſe unleſs the Condition is performed.

But the Lord *Keeper* inclin'd to over-rule the Demurrer: and ſaid, in all Caſes where the Matter lies in Compenſation, be the Condition precedent or ſubſequent, he thought there ought to be Relief. And by Agreement the ſigning and inrolling the Decree was ſet aſide, and the Cauſe to be heard *de Integro*.

Sir *James Johnſon* verſus *Deſmineere*.

Caſe 222.
9 Februar.
In Court Lord Keeper.

THE Plaintiff's Bill was an Appeal from a Decree of the Court of *Policies* and *Aſſurances* in *London*; whereby the Defendant below not appearing upon the firſt Summons, the Bill was ordered to be taken *pro confeſſo* againſt him: and for the Plaintiff it was inſiſted, that tho' by the Stat. 43 *Eliz. cap.* 12. and the Statute 14 *Car.* 2. *cap.* 23. the Commiſſioners may proceed in a ſummary Courſe without formalities of Pleadings, yet it was very ex-

Decree of the Court of *Policies* and *Aſſurances* in *London* reverſed, becauſe the Bill there was taken *pro Confeſſo* after the firſt Summons.

extraordinary to take a Bill *pro confeſſo* upon the firſt Summons; and they ought at leaſt to have had the Allegations in the Bill proved, before they proceeded to make ſuch Order: And it was ſaid, tho' the Courſe in this Court now is not to take a Bill *pro confeſſo* after the Party has once appeared and ſtands out in Contempt, till the Plaintiff is got to the end of the line, and has run through all the Proceſs of the Court againſt him; yet formerly this Court did not do it, even in that Caſe, without putting the Plaintiff to prove the Subſtance of his Bill.

Whereupon the *Lord Keeper* reverſed the Decree: And tho' in this Caſe the Appeal was not brought within two Months after the Decree, according to the ſaid Act of the 43 *Eliz.* yet in regard the Defendant could not make out, that the now Plaintiff had been fairly Summoned, the *Lord Keeper* admitted the Appeal; and thereupon the Parties agreed to try the Matter in an Action on the Caſe, the Plaintiff by Order being not to inſiſt upon the Statute of Limitations.

Attorney General verſus *Syderfen.*

Caſe 223.

11 Februarii. *In Court Lord Keeper.*

Deviſe of 1000*l.* for ſuch Charity as Teſtator had by Writing appointed, and no ſuch Writing being to be found, the King appointed the Charity, and the ſame was decreed accordingly.

MR. *Syderfen*, the Defendant's Brother, having by his Will (amongſt other things) charged a Manor in the *Weſt* of *England* with the raiſing 1000 *l.* out of the Profits, *to be applyed to ſuch charitable Uſe as he had by Writing under his Hand formerly directed*, and no ſuch Writing being to be found; and the Defendant his Brother and Heir at Law being in Poſſeſſion of the Eſtate; the Bill was brought in the Name of the *Attorney General* at the Relation of the *Governours* of *Chriſt's Hoſpital*, ſetting forth the Will, and that no ſuch Writing as was mentioned therein was now to be found, and that therefore the Application of this Charity was in the *King*, and charging that the Teſtator in his Life-time had frequently expreſſed his good Intentions towards this *Hoſpital*; and that the

King

King being informed that there was no ſuch Writing to be found as aforeſaid, had been graciouſly pleaſed to declare his Will and Pleaſure to be, that this Mony ſhould be laid out for the Benefit of the *Mathematical* Boys, which were of his own Foundation in *Chriſt's Hoſpital*; and it was therefore prayed, that the ſame might be ſo applyed.

The Defendant by Anſwer confeſſed the Will, but that the Writing therein referred unto was not to be found; and that he believed if any ſuch Writing was at any time made by the Teſtator, it was afterwards by him revoked and cancelled; for that ſubſequent to the making of this Will, he had charged ſeveral great Sums of Mony upon his Land, and that the whole Eſtate would ſcarce amount to anſwer all the Charges thereon, and the Heir would be diſinherited and left without any Proviſion.

Lord Keeper, It is no Queſtion but the Charity being now general and indefinite, (this Writing not being to be found) the Application of this Mony is now in the *King*; and his Majeſty having declared his Pleaſure to have it diſpoſed for the Benefit of the *Mathematical* Boys of his Foundation in *Chriſt's Hoſpital*, he thought it could not be better laid out: And tho' by the Will it was directed to be raiſed out of the Profits, yet it being a groſs Sum, he thought it would carry Intereſt to the time it ſhould be paid, and raiſed out of the Profits: And for as much as by the Will it was intended to be a Permanent Charity, he referred it to a Maſter, who by the Approbation of Mr. *Attorney General* ſhould ſee it laid out in Land for the Benefit of the ſaid *Mathematical* Boys, and decreed the ſame accordingly. And cited the Caſe of *Frier* verſus *Peacock* in this Court; where *Fryer* the Teſtator had given ſeveral particular Charities by his Will, and deviſed the Surplus *for the good of Poor People for ever*; and a Bill being brought, that the Surplus which was deviſed indefinitely, might be applyed for the Benefit of *Chriſt's Hoſpital* by the *King's* Direction, it was ſo decreed; altho' there were poor Kindred

A Deviſe for the good of poor People. The Deviſe being indefinite, the King may appoint the Charity.

Kindred of the Teſtator's, who inſiſted, they were within the Equity of that general Deviſe to a Charity.

Note, In this Caſe the Defendant by the Decree was to be indemnified againſt the Writing referred unto in the Bill, in caſe it ſhould be afterwards found.

Basket verſus *Peirce.*

Caſe 224.

Eodem die.

In Court Lord Keeper.

Ceſtuy que truſt in Tail with Remainder over levies a Fine and dies without Iſſue, and there are five Years *Non-claim.*

By Opinion of *Lord Keeper* Remainder Man barred.

A Man by his Will deviſes his Lands to Truſtees for 99 Years, for the Payment of his Debts and Legacies, and afterwards in caſe they ſhould not act and take upon them the Truſt within Six Months after his Death, then he deviſed the ſaid Lands to another and his Heirs in Truſt to pay his Debts and Legacies, and afterwards to *A* in Tail, Remainder in Tail to *B.* *A* levies a Fine, and dyes without Iſſue. Five Years paſs and *Non-claim.*

The Queſtion was, whether this Fine by *Ceſtuy que truſt* in Tail, and *Non-claim,* ſhould bar the Remainder Man in Tail? And the *Lord Keeper* was of Opinion, that it ſhould: For equitable Rights are as well to be bound by *Fines,* as Actions and Titles at Law; and cited the Caſe of *Freeman* and *Barnes,* where a Fine by *Ceſtuy que truſt* was adjudged a good Fine and Barr; and he was of Opinion, that it would bind at Law.

But it being urged for the Plaintiff, that in the Caſe of *Freeman* and *Barnes,* there the Fine was levyed by the *Ceſtuy que truſt* that had the whole entire Eſtate in him, and ſo was to work upon his own Equity only; but here the *Ceſtuy que truſt* had but an Eſtate Tail only, which was ſpent, and there were other Remainders over: And they did inſiſt in this Caſe, that the Remainder Man was not barred by *Non-claim*; for that all the Debts and Legacies were not paid, and ſo his Title was not commenced; and the Term for 99 Years did ſubſiſt, and was not expired; and

and it was inſiſted, that the entire Eſtate at Law being in the Truſtee, he ought to have entred, and it was againſt Equity to ſuffer the *Ceſtui que truſt* to be barred by Non-claim for the Laches of his Truſtee.

Whereupon the *Lord Keeper* decreed the Truſtee ſhould give leave to the Plaintiff to bring an Action in his Name to try his Title; and ſaid it being a Title at Law, he would not determine it himſelf; tho' his Opinion was, that the Plaintiff was barred.

Phillips verſus *Duke of Bucks.*

Caſe 225.
Eodem die.
In Court.
Lord Keeper.

THE Caſe was; that Mr. *Phillips* having formerly treated with the *Duke* of *Bucks* for the Purchaſe of the Manors of *Sheapeſhead* and *Garrowden* in the County of *Leiceſter*, and not agreeing upon the Price, the Treaty broke off: But to compaſs this Purchaſe Mr. *Phillips* procured Mr. *Niccoll*, the *Lord Chancellor Nottingham*'s Secretary, to negotiate this Matter for him; and it being pretended to the *Duke* (as was proved in this Cauſe) that this Purchaſe was for the *Lord Chancellor*, or for the *Sollicitor General* his Son, the *Duke* declared himſelf willing to oblige any of that Family; and ſaid, if the *Lord Chancellor* would pleaſe any way to ſatisfie himſelf of the Value of the Eſtate, he ſhould ſet his own Price. Afterwards Mr. *Niccoll* agreed with *Hemmings*, a Land Jobber, whom the *Duke* had imployed in this Affair, to buy this Eſtate for 28000 *l.* And thereupon the *Duke* and Mr. *Niccoll* entered into Articles, whereby the *Duke* did mention to grant, bargain and ſell this Eſtate to *Niccoll* and his Heirs in the Preſent Tenſe: and *Niccoll* covenants to pay 28000 *l.* for this Purchaſe, at ſuch times as were therein mentioned; and both of them ſealing each part of the Indenture, they were both Originals: and *Niccoll* goes immediately, and

A articles for the Purchaſe of *B*'s Eſtate, pretending he bought it for one, whom *B* was deſirous to oblige, but in truth bought it for another, and by that means got the Eſtate at an Under-Value. Equity will not decree an Execution of theſe Articles.

acknowledges before a *Maſter* in *Chancery* the Deed in his Cuſtody, and gets it inrolled.

The *Duke* afterwards diſcovering this Purchaſe was in truſt for Mr. *Phillips*, looks on himſelf as ill uſed in this matter, and refuſes to perform the Articles, or to execute Conveyances: But one Article being, that it ſhould be lawful for the Purchaſor to ſue in the *Duke*'s Name to compel his Truſtees to convey and his Mortgagees to aſſign to Mr. *Niccoll*, *Phillips* and *Niccoll* exhibit a Bill and make the *Duke* a party Plaintiff againſt the Truſtees and Mortgagee, ſetting forth the Articles, and that the Purchaſe was in truſt for *Phillips*, and praying the Defendants might convey and aſſign to the Plaintiff *Phillips*.

Afterwards the *Duke* upon a Motion, affirming that the Bill was exhibited in his Name without his Privity or Conſent, gets his Name ſtruck out of the Bill: Then Mr. *Phillips* amends his Bill, and makes the *Duke* a Defendant, and as againſt him prays an execution of the Articles in *Specie*. The Truſtees and Mortgagees anſwer. But the *Duke* ſtands out to a Sequeſtration; and then the Plaintiffs go on againſt the Truſtees and Mortgages without the *Duke*, and obtain a Decree againſt them to convey and aſſign, which the Mortgagees afterwards on Payment of their Money did accordingly.

One of the Defendants is in contempt, and ſtands out to a Sequeſtration, and the Cauſe is heard againſt the other Defendants; yet he may come in and anſwer, and the Cauſe may be heard again as to him.

Afterwards the *Duke* comes in and anſwers, and examines his Witneſſes, and the Cauſe coming on this day regularly to be heard as againſt him; and the matters aforeſaid being made out by proof, and likewiſe (tho' but ſlenderly proved) that the Lands were of greater Value, and were worth between 35 and 36 *thouſand* Pounds,

The *Lord Keeper* declared his Opinion, that there had not been fair and open dealing in the managing of this Affair; but that the *Duke* appeared to him to have been miſinformed and drawn in: And that the *Duke*, having a great

great Value for the *Lord Chancellor* or Mr. *Sollicitor*, declared himſelf willing to part with the Eſtate to either of them for leſs than he would have done to another: and that being the Intention of the Agreement, *Lord Keeper* ſaid, he would not in Equity carry it into execution for the benefit of a Stranger: and ſaid, Articles, out of which an Equity could be raiſed for a Decree in *Specie*, ought to be obtained with all imaginable fairneſs, and without any mixture tending to Surprize or Circumvention: and therefore declar'd, he could not in Juſtice decree theſe Articles to be performed in *Specie*; but propos'd that if the Parties would agree to go before a Maſter; and if a better Purchaſor did not come in within ſix Months, Mr. *Phillips* might retain his Purchaſe; but that Propoſition was diſliked on each ſide. The Duke deſir'd the Opinion of the Court, and Mr. *Phillips* thought he had a good Cauſe at Law on his Deed Inrolled; but offerr'd to ſubmit the Matter to the Lord *Keeper* as an Arbitrator: But that was declin'd by the *Duke*; he underſtanding the Court was of Opinion for him: And thereupon the Lord *Keeper* pronounced his Decree for diſmiſſing the Plaintiff's Bill: and put this Caſe, that if a Man, being about to ſell an Eſtate, ſhould be informed by *J. S.* that the Vendor's Brother deſir'd to be the Purchaſor, and thereupon the Vendor ſhould declare his Brother ſhould have a better Penny-worth than another Perſon; and he ſhould Article with *J. S.* for the Sale of it at an under value; and this Purchaſe ſhould be in truth for a Stranger; Lord *Keeper* thought, that Equity ought not to decree this Purchaſe: and ſaid, that Mr. *Phillips* had here a Perſon of great Honour to deal with, and ought to have carry'd the Matter fair and open with him; but declar'd, if the Bill had been brought in Mr. *Sollicitor*'s *name*, and he would have patronized the Purchaſe, the Articles muſt have been decreed, and no one can doubt, but he might have ſold it to Mr. *Phillips* the next Day: but it was another Caſe, that was now before him.

Equity will not Decree an execution of Articles, unleſs obtained fairly, and without Surprize or Circumvention.

A Co-Plaintiff, tho' but a Truſtee, cannot be examined as a Witneſs for the other Plaintiff.

Note, In this Caſe Mr. *Niccoll* was Mr. *Phillips*'s principal Witneſs to have prov'd the fairneſs of the Contract and Proceeding touching this Purchaſe; but he being a party Plaintiff (tho' Mr. *Phillips* had an Order to examine him *de bene eſſe*) could not be read, but muſt have been diſmiſſed before he could have become a Witneſs: But if Mr. *Phillips* had made him a Defendant to his Bill, as he might have done (and then the Truſt had been upon Oath, whereas it was now only alledged in the Bill) then Mr. *Niccoll* diſclaiming all Intereſt upon Oath, might have been a good Witneſs.

Note, Mr. *Phillips* had not proved the Value of the Land, as he ought to have done, but would have examined Witneſſes *viva voce* to it, but that would not be received.

Note, Tho' the Articles were Inrolled, and imported a preſent Grant, the legal Eſtate did not thereby paſs to *Niccoll*, it being in the Mortgagees.

Feilding verſus *Bond.*

Caſe 226.
1 Martii.
In Court Lord Keeper.

Charitable Legacies by the Civil Law are to be preferred to other Legacies.

A Man by his Will having deviſed ſeveral Legacies, and amongſt others, 40 *l.* to a Charity; and the Spiritual Court being of Opinion that tho' the Eſtate fell ſhort, and would not ſatisfy all the Legacies, yet that the entire 40 *l.* ought to be paid to the Charity in the firſt place, and not in Average or Proportion with the other Legacies, the Plaintiff exhibited his Bill, ſetting forth that the Eſtate was deficient and would not ſatisfy all the Legacies, and that the Spiritual Court notwithſtanding would compel the Plaintiff to pay this 40 *l.* for the Charity, without having any Security to refund.

If the Spiritual Court gives a preference to Charitable Le-

And the Plaintiff for that reaſon now mov'd for an Injunction to the Spiritual Court: but it was deny'd by the Lord

Lord *Keeper*, who ſaid the Civil Law was the Law by which Legatory matters were to be determined, and that the Spiritual Court had unqueſtionably the Proper Juriſdiction thereof; and if by their Law there was a Preference given to Charitable Legacies, he had no Power to alter the Law in that Point; and therefore refuſed to grant any Injunction, or to direct Security to be given for refunding in caſe of deficiency of Aſſets.

gacies, in caſe of Deficiency of Aſſets, this Court will not grant an Injunction.

D E

DE
Termino Paſchæ,

36 *Car' II.* 1684.

In Curia Cancellariæ.

Bonham verſus *Newcomb.*

Caſe 227.

In Court Lord Keeper.

Ante Caſe 6 & 212.

THIS Cauſe coming on to be heard *de Intergo* before the Lord *Keeper*, he adhered to his former Opinion; that there ought to be no Redemption in this Caſe: and Principally, becauſe it was proved in the Cauſe, that the Intent and Deſign of the Mortgagor was to make a Settlement by this Mortgage, and that he intended a Kindneſs and Benefit to the Mortgagee, in caſe he ſhould not think fit to redeem this Eſtate in his Life-time; and that there being an expreſs Covenant that the Mortgagor might redeem at any time during his Life, he thought he could not in Equity have been debarr'd of that Privilege: for by a Bill to foreclose a Man, you ſhall only bar him of his equitable Title, when the Eſtate in Law is become forfeited: but where he has a continuing title at Law, as in this Caſe an expreſs *Proviſo*, that he might redeem at any time during Life, he thought Equity could not debar him of that Privilege: and therefore being the Mortgagee in the preſent Caſe could not have compelled the Mortgagor to redeem, and he might have liv'd ſo long, as to have made it an ill bargain; and now, when by a Contingency it happens to be a good Bargain, there is no reaſon to raiſe

raiſe an Equity from thence to take the Eſtate from the Mortgagee; eſpecially in this Caſe there being a Kindneſs and Benefit intended him by the Mortgagor: and therefore reverſed the Lord *Nottingham*'s Decree, and diſmiſſed the Original Bill for a Redemption.

Bricker verſus *Whalley.*

Caſe 228.
30 Aprilis.
In Court.
Lord Keeper.

A Man by his Will, after Debts and Legacies paid, gives all the Reſidue and Surplus of his Eſtate to *A*, *B*, and *C* and the Wife of *C*, equally to be divided amongſt them, ſhare and ſhare alike.

Legacies given to *A*, *B*, and *C* and the Wife of *C*, equally to be divided amongſt them.

The only Queſtion was, whether *C* and his Wife ſhould be taken as one Perſon, and ſo have only One third part of the Surplus; or ſhould be taken as two Perſons, and ſo be intitled to a Moiety.

C and his Wife ſhall have but one third.

It was urged, that by the Words, *equally to be divided betwixt them*, they took as Tenants in Common, and not as Joint-tenants; and therefore muſt take as two Perſons; and that in this Caſe there ſhould be no Survivorſhip; but if the Husband dyed his Share ſhould go to his Executor, and not to his Wife: and by Mr. *Sollicitor General*, if Lands had been deviſed in like manner, the Husband and Wife ſhould take by Moieties, and as diſtinct Perſons.

But it being proved in the Cauſe, that the Wife was only of Kin to the Teſtator, and not the Husband, the Lord *Keeper* was of Opinion, that the Husband and Wife ſhould have but one third part; and the rather for that he obſerv'd the two (*Ands*) in this Deviſe, *viz* to *A*, *B*, and *C* and *W* his Wife: and tho' a Man may deviſe to ten Perſons, and add an (*And*) betwixt every Perſon's name, yet it is not natural or uſual to add an (*And*) till you come to the laſt Perſon.

Littleton Sect. 291.

Caſe 229.

Eodem die.

In Court Lord Keeper.

Ragget verſus *Clerke.*

An Eſtate by Occupancy not ſubject to Debts before the Statute of *Frauds.*

THE Bill was brought by an Executrix to be relieved againſt an *Occupancy*, and to ſubject the Eſtate to the Payment of Debts, pretending a deficiency of Aſſets.

It was ſaid for the Defendant, that it was not proved in the Cauſe, that there was any deficiency of Aſſets, but if it had, yet this Occupancy happening before the Statute of *Frauds* and *Perjuries*, the Eſtate was no wiſe ſubjected to the Payment of Debts: And of that Opinion was the *Lord Keeper*, and therefore diſmiſſed the Bill: And he cited a Caſe in the *C. B.* in the time of the *Lord Keeper Bridgman*, where the Queſtion was between an under Leſſee for Years, and a Tenant at Will, which of them ſhould be the Occupant; and it was adjudged for the Tenant at Will, againſt the Opinion of the *Lord Keeper Bridgman.*

Caſe 230.

6 Aprilis.

In Court Lord Kepeer.

Maſſenburgh verſus *Aſh.*

Contingent Limitation of a Term for Years adjudged to be good, the Contingency being to happen within the Space of 21 Years.

THE Caſe aroſe upon a Deed, touching the contingent Remainder of a term for Years: and tho' there was a Will in the Caſe, wherein there was a diſpoſition of the ſame Term; yet it was agreed the Will could not alter the Deed, but that the Caſe muſt depend on the Deed alone: And as to that the Caſe was thus. A Term for Years was aſſigned to Truſtees in Truſt for *Baron* and *Feme* during their Lives, and the Life of the longer Liver of them; and if there ſhould happen to be Iſſue Male of their Bodies living at the time of the deceaſe of the Survivor of them, then in Truſt, that the eldeſt Son of that Marriage ſhould be maintained out of the Rents and Profits, until he attained his Age of 21 Years, and then the whole Term to be aſſigned unto him; and in caſe he ſhould die before the Age of 21 Years, then in like manner for the Main-

Settlement of a Term on a Marriage in Truſt for the Husband for Life, Remainder to the firſt Son until 21, and after the firſt Son come to 21, then to ſuch firſt Son for the remainder of the Term.

Maintenance of the ſecond, third, fourth, and every other Son of that Marriage, one after another, till one of them ſhould attain the Age of 21 Years, and then the whole Term to be aſſigned to him: But in caſe there ſhould be no ſuch Iſſue living at the time of the deceaſe of the Survivor of the ſaid *Baron* and *Feme*; or in caſe there ſhould be ſuch Iſſue, and they ſhould all die before any one of them attained their Age of 21 Years, then he limitted the Term to the Plaintiff Sir *William Maſſenburgh* that was his eldeſt Son and Heir by a former Venter. *Baron* and *Feme* die, and leave a Son only, who dies whilſt an Infant of about 5 Years old.

But if the firſt Son dye before 21, then to the ſecond and every other Son in the ſame manner; and if no ſuch Son, or if all the Sons dye before 21, then to *J. S.* A good Limitation.

The Queſtion was, whether the Remainder over to Sir *William Maſſenburgh* was good?

In the arguing of this Caſe it was agreed by the Council, and ſo declared by the Court, that as to the Limitation of the Truſt of a Term, it was to be governed and guided by the ſame Rules in Equity, that the Deviſe of a Term is at Law, and not to be carryed further; and that ſuch Limitations or contingent Remainders as were good in one Caſe, would be ſo in the other. *Et è converſo.*

Secondly, That the general Rule that has hitherto obtained was, that you might limit a Term to as many Perſons as you would, one after another, that were *in eſſe* at the time of the Limitation; and one Step further, to a Perſon not *in eſſe*: But that there could be but one contingent Remainder of a Term for Years.

But the Council for the Plaintiff argued, that where there is a contingent Remainder limitted upon a contingent Remainder, if the firſt Contingency never happens, then the ſecond Contingency is good, and ſhall take place in Law: And inſiſted much on the Inconveniencies that People lie under, whoſe Eſtates conſiſt in Church Leaſes, by reaſon they have no Latitude left by ſome hard Reſolutions to make

make a Settlement of their Eſtates, or reaſonable Proviſion for their Families. That theſe Inconveniencies were formerly ſo far conſidered in this Court, that in ſuch Caſes they would admit Limitations over, which the common Law would not then allow; but ſeeing it done in *Chancery*, the *Common Law* Courts ſoon followed the Example of this Court; and inlarged much upon the Inconveniencies that might often happen, ſhould this Remainder be adjudged void: And obſerved that here was no danger of a Perpetuity, being the Contingency muſt of neceſſity happen within the Space of 21 Years at moſt after the deceaſe of either the *Baron* or *Feme*: And this Caſe cannot be ſaid to come nearer a Perpetuity than almoſt every Settlement of a real Eſtate; for here, if the Iſſue once attains his full Age, then the whole Term is to be aſſigned unto him, and he may diſpoſe of it at his Pleaſure, or otherwiſe it ſhall go in a Courſe of Adminiſtration. And they relyed ſtrongly on *Wood* and *Sanders*'s Caſe, as a Caſe adjudged in Point: and cited the Caſes of *Cotton* and *Heath*, and *Oakes* and *Chalfont*, *&c.*

Ro. 1. Abr. 612. Sect. 3.

On the other Side, the Defendant's Council inſiſted much on that Rule in caſes of Executory Deviſes, that one contingent Remainder was good, but a Contingency upon a Contingency is not to be allowed: and to the Caſe of *Wood* and *Saunders*, they oppoſed the Caſe of *Child* and *Baily*, and cited the Caſes of *Gooring* and *Bickerſtaffe*, and of *Gibbons* and *Summers* in the *Common Pleas*, and the Caſe of *Warman* and *Seaman* in this Court. And urged, that in caſe that Rule were to be broken, which allows only one contingent Remainder, there are no Bounds ſet; and no Man knows where it will end; for as they may appoint the Contingency to happen within the Space of 21 Years, ſo they may enlarge it to 30 Years, and from thence to 40; and ſo on without end.

2 Cr. 459.

Lord Keeper thought it a Caſe of great Conſequence; and for as much as he took the Rules in *Chancery* touching the

the Limitations of Truſts of Terms for Years, to be the ſame with executory Deviſes of Terms for Years at Law, he would have the Opinion of the Judges before he would determine any thing in this matter, and directed a Caſe ſhould be drawn, as the Caſe ſtood upon the Deed, and that it ſhould be tried in a feigned Iſſue in the Common Pleas.

Vid. Poſt Caſe 250.

Vere Eſſex Earl *of Ardglaſſe*, Plaintiff.
Henry Muſchamp, Defendant.

Caſe 231.
22 Aprilis.
Lord Keeper.

Grant of a Rent-charge in Fee after a dying without Iſſue Male ſet aſide for Fraud.

THOMAS Earl of *Ardglaſſe* for 300 *l.* in the Year 1675 did grant to the Defendant a Rent-charge of 300 *l. per Ann.* out of Lands in *Ireland* of 1000 *l.* a Year. To hold to the Defendant and his Heirs, and to commence from the *Firſt Michaelmaſs* or *Lady-day* after the Earl's Death without Iſſue Male; with a Proviſo, that if the Earl had any Iſſue Male who ſhould attain the Age of *Twenty one* Years, the Grant ſhould be void. Afterwards the Earl ſettled his Eſtate for 300 *l.* conſideration, to the Uſe of himſelf for Life, Remainder in tail to all his Iſſue Male, the Remainder in tail to the Plaintiff his Uncle, which was according to a former Settlement made by the Anceſtors of his Family, and which Earl *Thomas* upon his Marriage had barred; and then the Plaintiff and Earl *Thomas* both brought their Bill to be relieved againſt the Grant of the Rent-charge, alledging that it was obtained by Fraud and Practice, by debauching Earl *Thomas* with Drink and Women, and that the Grant was pretended to be only a Security for Repayment of the Mony and Intereſt: After which Bill brought, the Defendant obtained a Releaſe of that Suit from Earl *Thomas*, and the now Earl's Bill was (Earl *Thomas* being dead) to ſet aſide the Grant and Releaſe upon Payment of 300 *l.* with Intereſt: and upon the firſt hearing of this Cauſe before the *Lord Keeper*, tho' he declared there was a foul Practice, yet he doubted it might be too great a Violation upon Contracts, to ſet it aſide; therefore adviſed the Plaintiff to amend the Bill.

Vid. ante Caſe 70. & 125.

The Plaintiff afterwards obtained a Rehearing; and many Precedents in the Lord *Elſmere*'s, Lord *Bacon*'s and Lord *Coventry*'s times, and ſince, were produced, whereby it appeared, that unconſcionable Bargains, which had been made with young Heirs, had been ſet aſide by Decree of this Court; and it appeared in this Caſe, that at the time of the Bargain the Earl was very young, and had forſaken his Wife and her Friends in *Ireland*, and lived here in *London* in Riot and Debauchery, and for ſupply of his Expences had made this Bargain, without the Advice of any Friends or Council of his own; but relied wholly on the Defendant; and that the Conſideration was but one Year's Purchaſe for a Rent-charge in Fee, now fallen into Poſſeſſion, and that the Contingency of the Earl's dying without Iſſue Male (upon which the Defendant did inſiſt chiefly for his Defence) was an Artifice of the Defendant's (the Earl, as appeared in proof, being diſabled to get Children) and however that Contingency might be uſed as an Argument to perſwade the Earl, that he had the beſt of the Bargain, yet the *Lord Keeper* did not think it likely the Defendant would have made it, but in Expectation of an unreaſonable Advantage, and that the Earl would in a ſhort time by his vicious debauched Courſe of Life deſtroy himſelf, (as he did;) and it appeared alſo, that the Defendant was informed by the Earl's Surgeon, that the Earl was not able to get a Child, and therefore the Contingency was not to be looked upon, as if the Earl had been in ordinary Circumſtances; but as it was in the Eye of the Defendant, who was his Companion in thoſe Debaucheries: and it appeared alſo, that the Defendant was ſollicitous to draw the Earl into the like Bargains with other People, and that the Releaſe was obtained without any conſideration, after the Settlement on the Plaintiff.

Contingency of no Avail in caſe of a fraudulent Bargain.

Whereupon (tho' for the Defendant it was inſiſted that it was a juſt Bargain, in regard of the Contingency, nor had the Defendant any Means to recover his Mony again, and that the Bargain was made when the Earl was in good Health, and was acknowledged three Months after in order

to

to be inrolled, and that there was no Fraud in obtaining the Grant or Releaſe) The *Lord Keeper* declared, that the more he heard of the Cauſe, the worſe he liked it, and that the Earl of *Ardglaſſe* being eaſie, diſſolute and neceſſitous, the Defendant in conjunction with his Couſin *Deny Muſchamp*, who had got another unreaſonable Bargain from the Earl, which had been ſet aſide by this Court, had beſet the Earl, and having got a Copy of the Settlement, from *Muſchamp*, who had the Original, concealed both from the Earl: and that the Precedents produced came up to the Caſe, as he thought; And therefore, after ſome days Conſideration had, He decreed a Reconveyance or Releaſe of the Rent-charge, and that the ſame ſhould be ſet aſide, and a perpetual Injunction awarded, upon the Plaintiff's paying the Defendant 300 *l.* and Intereſt.

And the Defendant obtaining a Rehearing afterwards, the *Lord Keeper* upon the Rehearing declared, he was fully ſatisfied in the Decree, and that if he were to die preſently, he would make it; and ſo confirmed it.

Earl of Ardglaſſe verſus Pitt. 1685 or 1686.

About a Year afterwards, a Bill was brought by the Plaintiff againſt *George Pitt* Eſq; (who by the Agency of the Defendant *Muſchamp* had obtained, for 300 *l.* conſideration, the like Grant from the Earl of a Rent-charge of 300 *l. per Ann.* drawn exactly *mutatis mutandis* by *Muſchamp*'s Grant,) to be relieved againſt that Grant to *Pitt*, tho' Mr. *Pitt* inſiſted he did not tranſact that affair with the Earl himſelf, but being told by *Muſchamp*, that ſuch a Bargain might be had, left it to him to deal therein between them; and pretended utter Ignorance of the Earl's State of Life or Condition of Health, when the Bargain was made, ſo that he was innocent, and a fair Purchaſor; which Pretence being foreſeen, It was charged by the Bill particularly, that *Pitt*'s Method in carrying on the Contract by *Muſchamp* was a further Inſtance of the Fraud, that ſo, if he were queſtioned, he might deny his Knowledge of the Condition of the *Earl*; and tho' indeed the matter of the

the Defendant's Ignorance of the Earl's Condition was all he had to inſiſt on for his defence, more than what *Muſchamp* had in his Caſe, yet the *Lord Chancellor Jeffereys*, upon the hearing of this Cauſe, in as much as it appeared that *Muſchamp* had been Mr. *Pitt*'s Broker in other unreaſonable Bargains, declared that it was not to be believed that Mr. *Pitt* would make this Bargain without inquiry, and knowledge of the Condition of the Man he dealt withal; and that therefore Mr. *Pitt*'s Pretence of not perſonally knowing the Earl, or not treating with him, was not only a further Evidence of the Fraud; but that he was conſcious, he ſhould be queſtioned, and pretended *that* Ignorance, the better to excuſe it; and declared *Fraus eſt celare fraudem.* And decreed *Pitt* to releaſe and reconvey upon Payment of his 300 *l.* and Intereſt, and a Perpetual Injunction.

Fraus eſt celare Fraudem.

Caſe 232.
7 Maij.
In Court Lord Keeper.

Goman verſus *Salisbury.*

Agreement in Writing may be diſcharged by *Parol.*

THE ſingle Point of this Caſe was, Whether an Agreement in Writing made ſince the Statute of *Frauds* and *Perjuries* might be diſcharged by *Parol*? And *Lord Keeper* held it might. And therefore diſmiſſed the Bill, which was brought to have the Agreement executed in *Specie.*

Caſe 233.
9 Maij.
In Court Lord Keeper.

Yelverton Peyton and his Wife, Sir *John Roberts* and *Nathaniel Denham*, Plaintiffs.

William Bladwell, Heir and Executor of Sir *John Bladwell*, *& al'.* Defendants.

Underhand Agreement to defeat an Agreement made on Marriage ſet aſide as fraudulent.

SIR *John Bladwell* being Executor of Plaintiff *Peyton*'s Mother, and having purchaſed an Eſtate which belonged to Plaintiff's Mother, he promiſed that he would not only ſettle the ſaid Eſtate on Plaintiff, but alſo other Lands of 300 *l.* a Year, if a convenient Match could be found for the Plaintiff. Accordingly in 1676, Sir *John* treated a Marriage for him with the Neice of the Plaintiffs, Sir

John Roberts and *Denham*, and it was agreed betwixt him and Sir *John Roberts*, that Sir *John* ſhould give his Neice 2500 *l.* Portion, to be laid out in Lands after his Death, and that *Bladwell* ſhould ſettle Lands of the Value of 300 *l.* a Year, (whereof 200 *l. per Ann.* ſhould be ſettled for the Jointure) and that he would alſo ſettle other Lands of the Value of 100 *l. per Ann.* on himſelf for Life, remainder to Plaintiff *Yelverton Peyton* and his Heirs.

Accordingly by Leaſe and Releaſe, 14 and 15 *July* 1676, Sir *John Bladwell*, in conſideration of a Bond entered into by Sir *John Roberts* to pay 2500 *l.* after his and his Wife's Death for the Marriage Portion, conveyed Lands in the County of *Norfolk* which in the Conveyance were ſaid to be 300 *l.* a Year. And as to 200 *l.* a Year thereof, the ſame were limitted for the Jointure of the Wife of Plaintiff *Peyton*, Remainder to the Heirs Males of their two Bodies, Remainder to *Peyton* in tail, Remainder to him in Fee. And as to the Reſidue to Plaintiff *Peyton* in tail, Remainder to him in Fee. And Sir *John Bladwell* thereby covenanted, that the Jointure Lands were 200 *l.* a Year; and that within two Years then next, he would ſettle other Lands in *Norfolk* of 100 *l.* a Year, and worth 1700 *l.* to be ſold, to the uſe of himſelf for Life, Remainder to Plaintiff *Peyton* and his Heirs.

After the Marriage, Sir *John Bladwell* prevailed on Plaintiff *Peyton*, who was very young, on Promiſes of leaving him a greater Eſtate by his Will, than he had agreed to ſettle upon him, and by other Inſinuations, to execute a Writing, whereby Sir *John Bladwell* was to receive the Profits of the whole Eſtate, allowing the Plaintiff *Peyton* only 120 *l.* a Year, and to aſſign over to him Plaintiff *Robert*'s Bond, and alſo to releaſe or diſcharge the Agreement for the ſettling the 100 *l. per Ann.* on him and his Heirs after the Death of *Bladwell*.

The Plaintiffs Bill was to be relieved againſt theſe Agreements, which had been extorted from the Plaintiff *Peyton*, and to have the Jointure made good, the Lands ſettled for the Jointure not being of the Value of 200 *l.* a Year.

After long Debate the *Lord Keeper* decreed, that the Defendant *Bladwell*, notwithſtanding the Agreement with Plaintiff *Peyton*, ſhould account for all the Profits of the Eſtate, which Sir *John Bladwell* had been in Poſſeſſion of under that Agreement, over and above the 120 *l. per Ann.* and the Maſter was to ſee what was the Value of the Jointure Lands at the time of the Settlement: And the Defendant *Bladwell* was decreed to make good ſo much as the Jointure Lands fell ſhort of 200 *l. per Ann.* at the time of the Settlement made. And Sir *John Bladwell* having deviſed ſome Lands by his Will to Plaintiff *Peyton*, the Defendant was decreed to make up thoſe Lands 100 *l.* a Year, and to ſettle them on Plaintiff *Yelverton Peyton* and his Heirs, according to the Marriage Agreement.

And altho' it had been ſtrongly inſiſted by the Defendants Council, that the Agreement being to ſettle 100 *l. per Ann.* on *Yelverton Peyton* and his Heirs, he had Power to releaſe and diſcharge that Agreement; and there was no Benefit thereby intended to the Wife or Iſſue of that Marriage: And in caſe the Settlement had been actually made, it had been in Plaintiff *Yelverton*'s Power to have ſold, or given away thoſe Lands; the Settlement being to be made to him and his Heirs after the Death of Sir *John Bladwell*, and therefore he might well releaſe the Agreement, as to that 100 *l. per Ann.* and no one could be ſaid to be injured by it, no more than if he had deviſed away or ſold thoſe Lands:

Yet the Court declared its Deteſtation of ſuch underhand Agreements; and that it was a Deceit and Fraud as to Sir *John Roberts*, who was drawn in to give a great Portion

tion with his Neice, in Expectation of a Settlement adequate to it, which by this means is to be fruſtrated: For tho' Plaintiff *Peyton* could have diſpoſed of the Lands which were to have been ſettled on him and his Heirs, yet that is frequently done in many Settlements, the Father by that means being left at liberty to provide for his younger Children, and to reward them moſt, that behave themſelves beſt: But ſtill there is a Benefit intended to the Iſſue of the Marriage; and it is part of the Conſideration, for which the Portion was given: And therefore declared this under-hand Agreement and Releaſe to be fraudulent, and ſet the ſame aſide, and decreed the Agreement to be performed, as to the 100 *l. per Ann.*

DE
Term. S. Trinitatis,
36 *Car' II.* 1684.
In Curia Cancellariæ.

Caſe 234.

3 Junij. *In Court Lord Keeper.*

Baxter verſus *Manning.*

Mortgagee lends more Money to the Mortgagor on Bond.

The Mortgagor ſhall not redeem without paying the Bond Debt, as well as the Mortgage.

THE Plaintiff makes a Mortgage of his Eſtate to the Defendant, and afterwards the Mortgagee advances and lends more Mony unto the Plaintiff the Mortgagor on his Bond: The Plaintiff brings his Bill to redeem. The Defendant inſiſts to have his Bond Debt as well as the Mortgage-mony paid him.

Per Cur'. Altho' there is no ſpecial Agreement proved in this Caſe, that the Land ſhould ſtand as a Security for the Bond Debt, yet the Mortgagor ſhall not redeem without paying both.

Poſt Caſe 236.

Caſe 235.

4 Junij. *In Court Lord Keeper.*

Bletſow verſus *Sawyer.*

A Man ſettles Land of 6 *l. per Ann.* to the uſe of himſelf for Life, then to his Wife for Life, and agrees ſhe ſhall hold the Land, un-

THE Caſe was, a Man ſettles Lands to the Value of 6 *l. per Ann.* and more, to the uſe of himſelf for Life, and after to his Wife for Life; and further agrees, that ſhe ſhall hold and enjoy the ſame until 100 *l.* ſhall be paid by his Heir to her Executors, Adminiſtrators or Aſſigns. The Feme makes a Writing, purporting to be her laſt Will, and

and thereby diſpoſes of this 100 *l.* and dies in the Life-time of her Husband.

100 *l.* ſhall be paid by his Heir to her Executors, Adminiſtrators, or Aſſignees: She by a Writing purporting her Will diſpoſes of this 100 *l.* and dies in the life of her Husband.

The Queſtion was, whether this 100 *l.* were well diſpoſed of or appointed by her: And the Plaintiff's Counſel inſiſted, that it was not intended ſhe ſhould have any benefit of this 100 *l.* unleſs ſhe ſhould happen to ſurvive her Husband, and then ſhe might be capable of diſpoſing of it by Will; but dying a *Feme Covert*, her Will was void; and her Husband was intitled to the Adminiſtration.

A good Appointment in Equity.

Per Cur'. This Will is good, the Wife being as to this purpoſe, *quaſi à Feme Sole*; and without doubt it is a good Appointment in Equity.

Secondly, That this was but a Chattel Intereſt in her; and that ſhe might well diſpoſe of it in her Husband's Life-time: And it was ſaid in this Caſe, that where a *Feme Covert* ſaves Mony out of a ſeparate Maintenance, ſhe might diſpoſe of it as a *Feme Sole*; and that there had been ſeveral Decrees in this Court ratifying ſuch Diſpoſitions.

A *Feme Covert* in the Life of her Husband may diſpoſe of Mony laid up out of her ſeparate Maintenance.

Shuttleworth verſus *Laywick.*

Caſe 236.

7 Junij. *In Curia, Lord Keeper.*

WHERE there is a Debt ſecured by Mortgage, and alſo a Bond Debt; when the Heir of the Mortgagor comes to redeem, he ſhall not redeem the Mortgage without paying the Bond Debt too, in caſe the Heir be bound: So if there are two Mortgages, and one is defective, if he will redeem, he muſt take both.

Mortgagee lends more Mony to the Mortgagor on Bond; his Heir ſhall not redeem without paying off the Bond, as well as the Mortgage, in caſe the Heir is bound. *Ante Caſe* 234. 2 Ch. Rep. 164. Where a Man has two Mortgages, and one is defective, if the Heir will redeem, he ſhall take both. 2 Ch. Rep. 23.

Caſe 237.

5 Junij.
In Court Lord Keeper.

Beachinall verſus *Beachinall.*

Settlement being alledged to be made in purſuance of a Marriage Agreement, a Tryal was directed, to try what was the Marriage Agreement, but ordered the Settlement ſhould not be given in Evidence.

THE Bill was to be relieved touching a Marriage Agreement. Upon the Marriage there was a Deed executed, which imported to be a Settlement made in purſuance of the Marriage Agreement; but at the hearing there was ſtrong Proof by *three* or *four* Witneſſes, that this Deed was not drawn according to the Agreement; but that the Agreement was for ſettling more Lands of far greater Value, and to other Uſes.

The Cauſe was heard by the *Lord Chancellor Nottingham*, who directed the Agreement to be tryed at Law, and the Deed to be left out of the Caſe, and not given in Evidence.

On a Bill of Review the laſt part of the Order reverſed.

In a Bill of *Review* the Error aſſigned was, becauſe by this Decree they were not permitted to give the Deed in Evidence: And for that reaſon the *Lord Keeper* reverſed the Decree; ſaying, it was a ſtrange Order to take away a Man's Evidence, and then ſend him to Law.

Caſe 238.

Eodem die.
In Court Lord Keeper.

Trevanian verſus *Moſſe.*

Plea of a Purchaſe for a Valuable Conſideration muſt alledge *Seiſin* and *Poſſeſſion* in the Vendor.

A Plea of a Purchaſor for a valuable Conſideration over-ruled, becauſe the Defendant did not alledge *Seiſin* and *Poſſeſſion* in the Perſon, from whom he bought.

Caſe 239.

Eodem die.
In Court Lord Keper.

Fanſhaw verſus *Fanſhaw.*

Plea of Privilege by ſome of the Defendants not good, if there is another Defendant not privileged. 2 Ro. 274. G. 1.

TWO of the Defendants, being the Officers of the *Exchequer*, plead the Privilege of the *Exchequer*. Plea over-ruled, becauſe there was a third Defendant, who had no right of Privilege.

Bonſey verſus *Lee.*

Caſe 240.
Eodemdie.
In Court.

Impropriator of the ſmall Tythes bound to maintain a Prieſt, where there is no Vicaridge endowed.

And in ſuch Caſe the King may aſſign to the Curate ſuch proportion of the ſmall Tythes, as he thinks fit.

Otherwiſe where there is an Endowment, tho' never ſo ſmall.

WHERE there is no Vicaridge endowed, the Impropriator of the ſmall Tythes is bound to maintain a Prieſt; and upon an Information by the *Attorney General* for that Purpoſe, the *King* may aſſign to the Curate ſuch an Allowance or Proportion of the ſmall Tythes, as he ſhall think fit; but otherwiſe it is, where the *Vicar* is endowed, tho' but of never ſo ſmall a matter. The Caſe of the *King* and *Sutton* in the *King's Bench* was cited.

Godfrey verſus *Turner.*

Caſe 241.
5 Junij.
In Court Lord Keeper.

In what Caſe a Plaintiff muſt make Oath of the loſs of a Deed, where a Bill is brought touching ſuch Deed.
Ante Caſe 56. & 175.

DEMURRER; becauſe the Plaintiff had not made Oath of the Loſs of his Deed.

Per Cur'. Where you come only for Diſcovery of the Deed, you need not make Oath of the Loſs of it, as you muſt do, when you come for Relief; for you ſhall not tranſlate the Juriſdiction without Oath made of the loſs of the Deed.

Gibſon verſus *Scevengton.*

Caſe 242.
7 Junij.
In Court Lord Keeper.

Bill taken *pro confeſſo* after Defendant's appearance and ſequeſtration returned.

THE Defendant having appeared, and afterwards ſtood in Contempt, till a Sequeſtration was returned, It was inſiſted by the Plaintiff's Council, that the Bill ought to be taken againſt the Defendant *pro confeſſo*: and cited two Precedents, where it had been ſo done; and ſaid, it was no more than a Judgment by default at Law.

But the *Lord Keeper* would conſider of it, till the next Term.

And

Otherwiſe where Baron and Feme are Defendants, and the Wife only appears.

And it being alledged, that *Baron* and *Feme* were Defendants, and that it was the Wife only who had appeared; and that without the Husband's Privity; the *Lord Keeper* referred it to a Maſter to examine that Fact, and ſaid, if it ſhould fall out to be ſo, he could not decree againſt the Husband: but they muſt proceed, and lay on the Sequeſtration to bring him in: which the Plaintiff's Council ſaid, was but a ſorry Remedy, in regard that Sequeſtrators upon meſn Proceſs were accountable for all the Profits, and could retain only ſo far as to ſatisfie for the Contempts.

Sequeſtrators on meſn Proceſs accountable for the Profits, and can retain only ſo far as to ſatisfy for the Contempts.

Attorney General verſus *Baxter.*

Caſe 243.
Eodem die.

In Court Lord Keeper.

A. by Will in 1676 gives 600 *l.* to Mr. *Baxter* to be diſtributed amongſt 60 ejected Miniſters.

Upon an Information by the Attorney General, decreed the Charity to be void, and the Mony to be applied for the Maintenance of a Chaplain for *Chelſea* College.

ROBERT Mayot, who was a beneficed Clergy-man of the *Church* of *England*, by his laſt Will, 12 *October* 1676, bequeathed 600 *l.* to Mr. *Baxter* to be diſtributed by him, amongſt 60 *Pious ejected Miniſters*, and adds, I would not have my Charity miſunderſtood. I do not give it them for the ſake of their Non-conformity: but becauſe I know many of them to be pious and good men, and in great want. He alſo gave Mr. *Baxter* 20 *l.* and 20 *l.* more to be laid out in a Book of his, entitled, *Baxter's Call to the Unconverted.*

Upon this Will Mr. *Attorney General* exhibited an Information, wherein he alledges this Charity to be againſt Law, and that therefore the Right of applying this Mony was in the *King*; and that his *Majeſty* had declared his Pleaſure to be, that this 600 *l.* ſhould go towards the building of *Chelſea* College.

Mr. *Baxter* in his Anſwer ſtated the Controverſy between the *Conformiſts* and *Diſſenters*, and ſhow'd upon how ſmall a Matter ſome, that conformed in all other Points, were kept out of the Pale of the Church, and ejected from their Livings: and then ſwore himſelf a Conformiſt, and

that he knew many poor pious and ejected Miniſters, that were in great want, and forced to undertake ſervile Imployments for their Livelyhood; and that he accepted of the Truſt repoſed in him by his Teſtator, and intended, as ſoon as he could get this Mony of the Executors, to diſtribute it according to his Teſtator's Intention amongſt poor ejected Miniſters, who he ſuppoſed were not diſabled by Law from taking of a Legacy; and ſaid, he did not believe the Teſtator had any deſign againſt the Government; being very conformable to the Church, and one whom he never ſaw; and that the Teſtator was very charitable, and ſets out many excellent Charities of his in his Life-time, that were legal and allowed: and as for the Book mentioned in the Teſtator's Will; it was, he hoped, not condemnable, nor ever condemned; but had been printed *two and Twenty* times, and licenſed, *&c.* and hoped the Doctrine and Diſpoſition of the Diſſenters, meerly as ejected Miniſters, was not ſo bad, as to forfeit all Charities; his *Majeſty* having in his Declaration declared in theſe words, *viz. We muſt for the Honour of all of either Perſwaſion, with whom we have conferred, Declare, that the Deſires of all for the Advancement of Piety were the ſame; their Zeal for the Peace of the Church the ſame; they all approve Epiſcopacy and a Liturgy in a ſet form; and if on ſuch Excellent Foundations any ſuch Structure ſhould be for leſſening the Gift of Charity, a vital Part of the Chriſtian Religion, we ſhall think our ſelves unfortunate, and defective in the Adminiſtration of Government God hath intruſted us with,* &c. and Mr. *Baxter* ſaid further, he thought his *Majeſty* was not miſtaken; and that not only Religion, but Humanity, binds Men to pity thoſe who ſpent their Lives in ſtudying to know God's Will, and yet by Miſtake in ſome Opinions are fallen into Want; and therefore owned his diſſent againſt reſigning other Men's Suſtenance, and hoped the Court would not miſconſtrue that Act of Charity.

The *Attorney* and *Sollicitor General, &c.* argued, that this was a Deviſe to the 60 ejected Miniſters, *eo nomine*, as they were Diſſenters; and to ſuffer them to take

by ſuch a Deviſe was almoſt to make a Corporation of them, and it would certainly encourage and keep up a perpetual Schiſm in the Church, which the Law would not endure.

For the Defendant it was argued, that this was a good Bequeſt, and that Diſſenters were not diſabled from taking a Legacy. Any Deviſe, tho' to a Superſtitious Uſe, was good at common Law; and it wou'd not be pretended, that this Deviſe was within any of the Statutes of Superſtitious Uſes. The Deviſe was made by a Conformiſt, who had he or a Diſſenter given 10 *l.* a-piece to 60 Diſſenters by Name, there would not be the leaſt Pretence to make that Legacy void: And what has the Teſtator done here? He has deputed Mr. *Baxter* to name the 60 Perſons for whom the Charity was deſigned; and what Law has diſabled him from executing this Power of Nomination, tho' he had been a Diſſenter? But he by his Anſwer has approved himſelf one of the Church of *England:* And it was ſaid, there could be nothing of weight in the Objection, that ſuch Bequeſts wou'd keep up a Schiſm in the Church; in regard here was nothing durable; no Land, no Rent, no Annuity given, only one groſs Sum of 10 *l.* to a Man, which would only buy Bread for his Family for a very little while; but if that was a real Miſchief, yet to damn this Charity, would be no Remedy to the Evil, for it would but teach the Diſſenters for the future to name the Parties, or to diſpoſe of their Charities in their Life-times; and in that Caſe the Diſſenters will only have a better Opportunity of drawing out and extending their Donors Charities: And it was obſerved, that the Bequeſt was to *poor ejected Miniſters,* now there are many ejected for want of Titles, and are fit Objects of Charity.

The *Lord Keeper* told Mr. *Attorney,* that Cauſes of this Moment ought not to be brought before him, but in Term time, when he might have the Aſſiſtance of the *Judges:* But however being he had now heard the Matter, and was

not doubtful in the Caſe, he would not defer making his Decree: and adjudged the Charity (that is the Uſe) to be void, and that the Mony ſhould be applyed for building of *Chelſea* College.

Then it was urged, that if the Charity was void, the Mony ought to remain with the Executor: But the Court ſaid, there was a difference between the Charity and the Uſe; and that the Uſe was void, and not the Charity.

Then it was obſerved to the Court, that the Practice had always been to apply Charities *in eodem genere*, and this being intended for ejected Miniſters, ought to go amongſt the Clergy.

And thereupon the *Lord Keeper* decreed it for the Maintenance of a Chaplain for *Chelſea* College.

Note, This Decree was reverſed by the *Lords Commiſſioners* in *Trinity* Term 1689, and the 600 *l.* which had been brought into Court, ordered to be paid out and diſtributed according to the Will.

Churchill verſus Lady *Speake.*

Caſe 244.

THE Caſe was, that one *Prideaux*, the Plaintiff's Grand-father, and Father of Sir *John Churchill*'s Wife, being (amongſt other things) Poſſeſſed of and Intitled to a Mortgage for 1000 *l.* gave this Mortgage (amongſt other things) to his Wife, willing her to give 500 *l.* of it to the Plaintiff his Grand-daughter; (Sir *John Churchill*'s eldeſt Daughter) *But as to the time when, and manner of giving it, he left it to his Wife's Diſcretion, as ſhe ſhould think fit, and beſt for his ſaid Grand-daughter.* And having thus made his Will, he died about 1664, the Plaintiff his Grand-daughter being then an Infant of about 9 Years old.

A gives a Legacy to his Grand-daughter, an Infant, to be paid at ſuch time and in ſuch manner as his Wife, who was his Executrix, ſhould think fit and beſt for his Grand-daughter.

The Executrix lived near twenty Years after the Death of *A*, and died without paying the Legacy.

Decreed the Legacy to be paid, with Intereſt from the Death of *A*, tho' no Demand made in the Life of the Executrix.

Mrs. *Prideaux*, the Plantiff's Grand-mother, lived till 1683, and then died, making the Defendant the Lady *Speake* her Executrix, having paid no part of this 500 *l.* neither was the ſame in all that time ſo much as demanded of

of her: And the Plaintiff's Bill was to have this Legacy of 500*l.* given unto her by her Grand-father, paid with Intereſt.

And the *Lord Keeper*, notwithſtanding there was not any Demand prov'd, and tho' Mr. *Prideaux* left the Time and Manner of paying this 500*l.* to his Wife, Decreed the 500*l.* with Intereſt from the Death of *Prideaux* the Grand-father, being near twenty Years.

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Term. S. Michaelis,

36 *Car' II.* 1684.

In Curia Cancellariæ.

Anonimus.

Case 245.
16 Octobris.
In Court Lord Keeper.

If one of the Parties after Publication passed has an Order to examine upon the usual Affidavit, the other Party may not only cross-examine, but examine at large.

UPON a Motion for leave to examine after Publication, upon making the usual Oath of not having seen the Depositions; the *Lord Keeper* declared, That in such a Case the other Side should be at Liberty to examine at large, as well as to cross-examine the Witnesses produced by the Party that made the Motion; (which was all he might do formerly) and his Reason was, that a crafty Sollicitor may lye in the lurch, and examine nothing till after Publication is past; and the other Party may think himself secure, and so not examine to those Points, which he could otherwise have proved, in regard he finds his Adversary has not examined to those matters: And when once Publication is past, and the Party that examined has seen his own Depositions; then the Side that lay still having tyed up his Adversary, so that he can only cross-examine the other's Witnesses, applies for an Order upon the usual Affidavit to enlarge Publication, and when he has got that Order, then he comes in with a whole Cloud of Witnesses: and tho' it may be thought hard, that any one should have liberty to examine, after he has seen the

Depoſitions; yet his *Lordſhip* thought it a reaſonable Penalty on ſuch, as would not examine in time; or that ſhould lie upon the catch to take Advantage of the other Party; and ordered the Regiſter to take notice of it as a fixt Rule for the future.

Caſe 246. ## *Corporation de Sutton Coldfeild* verſus *Wilſon.*

24 Octobris. *In Court Lord Keeper.*

Whether a Member of a Corporation may be a Witneſs for the Corporation.

THE Queſtion being, whether a Bond of 400 *l.* Penalty was intended for the Benefit of the *Corporation* or of the Defendant, and the Witneſſes for the Plaintiff being all Members of the *Corporation*, it was objected that they could not be read, they ſwearing for their own Benefit; which Exception was allowed as good: And the *Lord Keeper* ſaid, that a *Corporation* ought to have a Town Clerk and Under-Clerks that are not Freemen, that they may be competent Witneſſes upon Occaſion: And he ſaid he thought it very hard in the Caſe of the *Waterbailage* of *London*, that no one Freeman of the City, tho' it was not Six Pence Concern to him, could be admitted as a Witneſs: But there indeed the Fee was in Queſtion; and here being only a bare Sum of 200 *l.* in Diſpute, he thought that not conſiderable enough to take off a Man's Teſtimony; and ſaid it was uſual, where a Man was a Legatee, if it was an inconſiderable Legacy, as 5 *s.* (or 5 *l.* to a Man of Quality) that he ſhould nevertheleſs be a Witneſs to prove the Will.

Croſs-examining a Witneſs by one Side in any Matter tending to the Merits, makes him a good Witneſs for the other Side, tho' otherwiſe liable to an Exception.

At length it appearing, that the Defendant had croſs-examined ſome of the Plaintiffs Witneſſes not only to Queſtions, barely whether they were of the Corporation or not, but to other Queſtions which tended to the Merits of the Cauſe; the *Lord Keeper* declared, *that* made them good Witneſſes, tho' they were Members of the *Corporation*, and upon their Evidence it was decreed for the Plaintiffs.

Barlow

Barlow verſus *Grant.*

Caſe 247.

27 Octobris. *In Court Lord Keeper.*

UPON a Bill for 100 *l.* Legacy given to a Child, the Defendant inſiſted upon an Allowance of 16 *l.* a Year for keeping the Legatee at School.

Mony expended for Maintenance and Education, ſhall be allowed out of a ſmall Legacy given to an Infant, tho' it breaks into the Principal.

It was objected, that only the bare Intereſt of the Mony ought to have been expended in his Education, and not to have ſunk the Principal, as in this Caſe the Defendant had done.

Otherwiſe, where the Legacy is conſiderable.

But the *Lord Keeper* thought it fit and reaſonable to be allowed; and ſaid, the Mony laid out in the Child's Education was moſt advantageous and beneficial for the Infant, and therefore he ſhould make no Scruple of breaking into the Principal, where ſo ſmall a Sum was deviſed, that the Intereſt thereof would not ſuffice to give the Legatee a competent Maintenance and Education: But in Caſe of a Legacy of 1000 *l.* or the like, there it might be reaſonable to reſtrain the Maintenance to the Intereſt of the Mony.

Legacy given to an Infant to put him out Apprentice, and he dies before he is of a competent Age to be put out.

In this Caſe there being 30 *l.* alſo given to the Infant to bind him an Apprentice, the Infant died before he attained a competent Age to be placed out an Apprentice, and the Queſtion was, whether this 30 *l.* ſhould go to the Executor of the Infant?

It ſhall go to his Executor or Adminiſtrator.

Lord Keeper. I think this 30 *l.* ought to go to the Executor or Adminiſtrator of the Infant: And in this Caſe the Infant being 17 Years old, and having made a Will, and named an Executor, it was allowed to be a good Diſpoſition of the 30 *l.*

Heycock

Caſe 248.

Eodem die.

In Court.

Heycock verſus *Heycock.*

Mony deviſed to be raiſed out of Profits, and the Profits will not raiſe it in a convenient time, the Court will decree a Sale.

IN this Caſe the *Lord Keeper* declared, he took it to be the Law of this Court; that where there is a Deviſe of a Sum certain to be raiſed out of Profits of Lands; if the Profits will not amount to raiſe the Sum in a convenient time, the Court will decree a Sale.

Caſe 249.

28 Octobris.

In Court Lord Keeper.

Parker verſus *Aſh.*

How the Spiritual Court proceeds where there are Raſuresin a Will, and the Executrix ſubmits to have the Will proved, as tho' no ſuch Raſures had been therein.

THE Bill was for Payment of a Legacy, given to the Plaintiff by the Will of *A. B.* in which Will many Legacies, and (amongſt others) the Plaintiff's Legacy, were eraſed, and ſuch Raſures were ſuppoſed to have been done by the Teſtator in his Life-time: But when the Will came to be proved, and this Matter conteſted in the Spiritual Courr, the Executrix ſubmitted that the Will ſhould be proved, as if no ſuch Raſures had been made; and an Inſtrument purporting her Conſent to this Matter, was annexed to the Will.

Lord Keeper. I take the Executrix to be concluded by this Conſent, which prevented the Examination of the Matter when it was freſh; and it may be ſhe knew that the Raſures could have been proved to have been made after the Death of the Teſtator: But ſaid, the uſual courſe in ſuch Caſes is to have a Sentence againſt the Raſure, and then a Probate granted with the Words razed out inſerted therein.

Then the length of time ſince the Death of the Teſtator, and the Staleneſs of the Demand, were inſiſted upon.

A Legacy not within the Statute of Limitations.

But to this it was anſwered, that a Legacy is not within the Statute of *Limitations*; and length of Time is only

a Presumption of Payment: But in this Case the Defendant does not pretend a Satisfaction, but only contests the Duty. And there is this difference between Debts and Legacies, as to their Antiquity. Legacies always appear upon the Face of the Will, and so an Executor knows what he ought to pay, without being asked or told: But for Debts and other dormant Demands, against which he cannot provide without notice; there the Statute had reason to limit the Time.

The *Lord Keeper* decreed the Legacy against the Defendant, who was Executor of the Executrix: And the first Executrix having delivered over great part of the Assets to the Defendant in her Life-time, an Account had been afterwards stated betwixt them, and a Release given: However it was directed, that an Account should be taken of the whole Assets, and that what the Defendant had received, he was to answer out of his own Estate, and that what was wasted by the first Executrix, the Defendant was to answer as far as he had received Assets.

Massenburgh versus *Ash.*

Case 250.
Eodem die.
In Court Lord Keeper.
Ante Case 230.
Post Case 298.

IT having been ordered at the hearing of this Cause, that a Case should be drawn up, as it stood upon the Deed, for the *Judges* of the *Common Pleas* to give their Opinion upon; it was now moved, that the *Lord Keeper* would rehear the Cause, and be attended with *Judges*, or that it might be presented to the *Judges* for their Opinions, as a Case in Equity, as well as a Point in Law.

The *Lord Keeper* declared his Opinion was, that he could go no farther in Equity, than the Law went in Case of an Executory Devise; but however directed the Case to be drawn up at large for the *Judges* Opinions, as well in point of Equity as of Law; and in case they were of an Opinion, that Equity ought to go farther than the Law, he would consider further of it.

Dux *Bucks* verſus Sir *Robert Gayer.*

Caſe 251.
30 Octobris.
In Court. Lord Keeper.

Mortgagee recovers Judgment in Ejectment, but in combination with the Tenant in poſſeſſion refuſes to take out Execution.

He ſhall be compelled ſo to do, or anſwer for the Profits, as in Caſe of wilful Default.

Vid. poſt Caſe 262 & 265

SIR *Robert Gayer*, who was a Mortgagee under the *Duke*, had brought an Ejectment, and recovered Judgment againſt the *Duke* of his *Berkſhire* Eſtate, of which one *Goodchild* who had a Leaſe for 3 Years was in Poſſeſſion, but paid no Rent, and was in truth inſolvent: And Sir *Robert Gayer* in Combination with this *Goodchild* (who was accountable to the Duke for 18000*l.*) refuſed to take out Execution; and the *Duke* could not eject *Goodchild* by reaſon of *Gayer*'s Judgment. It was therefore moved, that Sir *Robert Gayer* might be compelled to take out Execution, and receive the Profits in diſcharge of his Debt.

But it was ſaid by the Council for the Defendant, that no Order was ever yet made to compel a Mortgagee to take out Execution, whether he would or not; and to order the Defendant to take out Execution, might involve him in a Suit with *Goodchild*: and it was to make him, *Nolens Volens*, the *Duke*'s Bayliffe; and a Mortgagee, who deſires to act diſcreetly, would not enter before he had foreclоſed the Equity of Redemption.

The *Duke*'s Council ſaid, they would not compel Sir *Robert Gayer* to be the *Duke*'s Bayliffe, but in Caſe he did not think fit to receive the Profits, they deſired the Rent might be brought into Court; which the Court held reaſonable: And ordered that unleſs Sir *Robert Gayer* take out Execution before the end of the Term he ſhould be anſwerable for the Profits, as in Caſe of willful Default.

Carter

Carter verſus *Carter.*

Caſe 252.
31 Octobris.
In Court Lord Keeper, and Juſtice Levins.

If *A* and *B* on one Part and *C* on the other ſubmit to Arbitration, the Arbitrators may make an Award, not only of matters in difference between *A* and *B* jointly, or *A* and *B* ſeparately, and *C*, but alſo of Matters between *A* and *B*.

THE Caſe was; *Ralph Carter*, and *John Dawſon* Executor of *Richard Carter* of the one Part, and *Anne Carter* the Widow of the ſaid *Richard Carter* of the other Part, having ſubmitted themſelves to an Award, and entered into a Recogniſance for Performance of it; an Award was made, wherein reciting, that the ſaid *Richard Carter* had acknowledged a Judgment of 100*l.* to the ſaid *Ralph Carter*; and that the ſaid *Anne Carter*, as being *terre tenant*, was by reaſon of that Judgment diſturbed in her Jointure; It was (amongſt other things) awarded that the ſaid *Ralph Carter* ſhould acknowledge Satisfaction upon this Judgment.

In a *Scire fac.* upon this Recogniſance, the Breach aſſigned was, that Satisfaction was not acknowledged upon the Judgment: and the Exception taken by Mr. *Holt* was, that the Award was larger than the Submiſſion: for when *A* and *B* of the one Part, and *C* of the other, ſubmit to an Award; that is a Submiſſion of the Differences that *C* had with *A* and *B* jointly, or with either of them ſeverally; but this does not ſubmit any Differences that might be between *A* and *B* Now in this Caſe *Ralph Carter*, the Conuſee of the Judgment, had two Remedies; one againſt *Anne Carter* as *terre tenant*, to bind the Lands; and another Remedy againſt the ſaid *John Dawſon* as Executor of the ſaid *Richard Carter*, to follow the Perſonal Eſtate; and therefore the Award ought not to have been, that Satisfaction ſhould be acknowledged on the Judgment, which deſtroyed both Remedies, but only that the Land ſhould be freed and diſcharged from this Judgment.

But upon hearing of Mr. *Pollexfen* on the other ſide, the *Lord Keeper* and Mr. *Juſtice Levins* were both of Opinion, that the Award was well made, and the Breach

well assigned; for that all Parties concerned in the Judgment were before the Arbitrators; and *Ralph Carter*, who made the Submission, had the whole Power of the Judgment in him; and therefore ordered Judgment to be entered upon the *Scire fac.* unless better Cause was shewn to the contrary, *&c.*

Case 253.
Eodem die.
In Court Lord Keeper.

Dutch versus *Kent & al'.*

Deed of Trust for Payment of such Creditors as come in within a Year. A Creditor will not be excluded, tho' he doth not come in, till after the Year. But a Bill may be exhibited after the Year to compell the Creditors, who stand out, to come in or renounce the Benefit of the Trust.

THE *King* being indebted to *Colvile* a Banker in 84700 *l.* and *Lindsey* a Bankrupt having married *Colvile*'s Widow, and Executrix, the *King* by his Letters Patents in Consideration of the said Debt, grants to *Lindsey* an Annual Sum Issuable out of the hereditary Excise, upon special Trust in the Patent declared, that all such of *Colvile*'s Credtoirs, as would come in within a Twelvemonth, and accept a Share of this Annual Sum proportionable to their Debts, should have the same assigned to them. The Year was long since past; and the Plaintiff being a Creditor of *Colvile*'s brings his Bill to have the Benefit of this Trust, and complains that *Lindsey* had made several Assignments to the Defendants, who were none of *Colvile*'s Creditors, and that *Lindsey* had out of *Colvile*'s Estate paid off several Bonds, and kept the same on Foot, and made Assignments of them to the Defendants in Satisfaction of his own Proper Debts, under Colour whereof they had come in under this Trust, and had the Benefit of these Letters Patent.

Where a Deed of Trust is for Payment of Debts in general, a Purchasor is not affected with any Misapplication of the Mony.

In this Case for the Plaintiff it was insisted, that altho' *Colvile*'s Creditors came not in within the Year, that yet this was a continuing Trust for them. And Mr. *Sollicitor* did admit, that a Trustee for Payment of Debts in general may sell upon good Consideration, and the Purchasor, tho' he had Notice of the Trust, shall not be affected with any Misapplication of the Mony; for the Land being sold for a good Consideration, *that* is discharged; and it is the Mony

Mony that is to be apply'd for Payment of the Debts; unleſs the Debts be particularly mentioned in a Schedule, or in the Deed of Truſt; and in ſuch Caſe, the Purchaſor muſt at his Peril ſee the Mony rightly imployed, and the Debts diſcharged: and it was admitted, that if *Lindſey* had Adminiſtred *Colvile*'s Eſtate, and was in Disburſe more than the Aſſets which he had received amounted to, that for ſo much *Lindſey* was a Creditor to *Colvile*, and ſhould have the Benefit of this Truſt.

Otherwiſe, where it is for Payment of Debts particularly ſpecified.

But in this Cauſe there being many Defendants, and their Caſes different and diſtinct, the Lord *Keeper* would not enter into the Debate of any of them, but referr'd it to a Maſter, to ſtate all the Particular Caſes to the Court, and directed the Maſter to certify when the Aſſignments were made, and whether for *Lindſey*'s proper Debts, and whether *Lindſey* was a Creditor to *Colvile* at the time of the Aſſignments made; and in that reſpect he was to ſee, if *Lindſey* compounded any of *Colvile*'s Debts; for he being Executor in right of his Wife, he could not have the Benefit of thoſe Compoſitions.

Anonimus.

Caſe 254.

IN a Bill to be reliev'd touching a Leaſe for Years or other Perſonal Duty againſt Executors; tho' the Executors be but Executors in Truſt, yet it is not neceſſary to make the *Ceſtuy que Truſts* or reſiduary Legatees Parties.

In a Bill againſt Executors, who are only Executors in Truſt, it is not neceſſary to make the *Ceſtuy que Truſts* or Reſiduary Legatees Parties.

Palmer verſus *Trevor.*

Caſe 255.

4 Novembris. *In Court Lord Keeper.*

A. B. deviſed 100 *l.* to the Plaintiff's Wife, to be paid within ſix Months after the Teſtator's Death; and a Bill being brought for this Legacy, the Defence, which the Defendant the Executor made, was, that he had paid the Legacy to the Plaintiff's Wife, and had her Receipt for it:

Legacy bequeathed to a Feme Covert. Payment to her alone not good.

and the Defendant's Council inſiſted, that this was a good Payment; for that without doubt a Man might ſo deviſe a Legacy to a Feme Court for her ſeparate Maintenance, as that the Husband ſhould not intermeddle with it, and that the Wife's Receipt ſhould be a ſufficient Diſcharge for it. And they further inſiſted, that ſuch was the Intent of the Teſtator in this Caſe, and that the Will ought to be ſo conſtrued in Equity; for at the time of making this Will, the Plaintiff and his Wife were parted, which was then well known to the Teſtator, and that the Wife was much ſtraitned for want of Maintenance; and it was ſaid that the *Civil* Law, whereby Legatory Matters were properly determinable, was, that ſuch a Legacy ought to be paid to the Wife: But the Defendant's Council not being prepar'd to maintain that Point, the Lord *Keeper* held it no good Payment; and decreed the Legacy to be paid to the Plaintiff with Intereſt; it being to be paid by the Will at a certain time, *viz.* within ſix Months after the Teſtator's Death.

Where a Legacy is to be paid at a certain Day, it ſhall carry Intereſt from that time, if not paid.

Foſter verſus *Merchant*, & è Contra.

Caſe 256.

Eodem die.

In Court Lord Keeper.

THE Bill was by a ſecond Committee of a Lunatick againſt the firſt Committee *& al'*, to call him to an Account for the Profits of the Lunatick's Eſtate.

Committee of a Lunatick cannot make Leaſes, nor incumber the Lunatick's Eſtate, without leave of the Court.

Lord Keeper. The Committee of a Lunatick has an Eſtate but during Pleaſure, and therefore cannot make Leaſes, nor any ways Incumber the Lunatick's Eſtate, without ſpecial Order of this Court, where the Profits are not ſufficient to maintain the Lunatick.

Mortgage made by a Lunatick, when *ſane* for 50*l.* and more Mony taken up upon it by the Com-

In this Caſe, the Lunatick, before he became ſuch, having made a Mortgage of good part of his Eſtate for 50*l.* the Committee had transferr'd this Mortgage, and taken up 3 or 400*l.* more upon it.

The

The Lord *Keeper* declared, the Mortgage ſhould ſtand a Security for 50 *l.* only.

mittee, ordered to ſtand a Security only for the firſt 50 *l.* Committee not to be allowed for Buildings and Improvements on the Lunatick's Eſtate.

And as to Improvements and Buildings made by the firſt Committee on the Lunatick's Eſtate, for which he craved an Allowance; the Lord *Keeper* declared the Heir upon the Lunatick's Death muſt be let into the Eſtate, without making any Allowance for ſuch Improvements.

Maſter to ſee, what was fit to be allowed for Maintenance of the Lunatick's Son.

And as to an Allowance demanded for the Lunatick's Son's Maintenance, the Lord *Keeper* referred it to a Maſter to examine and report, what Maintenance was reaſonable to be allowed.

Deguilder verſus *Depeiſter.*

Caſe 257.
Eodem die.
In Court Lord Keeper.

THE Caſe was upon a *Bottomry* Bond, whereby the Plaintiff was bound in conſideration of 400 *l.* as well to perform the Voyage within ſix Months, as at the ſix Months end to pay the 400 *l.* and 40 *l.* Premium, in caſe the Veſſel arriv'd ſafe, and was not loſt in the Voyage.

A intending to go a Voyage, enters into a *Bottomry* Bond, but the Ship not going the Voyage, but lying all along ſafe in the Port of *London*, the Court decreed the Defendant ſhou'd loſe the Premium, and accept of his Principal with uſual Intereſt.

It fell out, that the Plaintiff never went the Voyage, whereby his Bond became forfeited: and he now preferr'd his Bill to be reliev'd; and upon a former Hearing, in regard the Ship lay all along in the Port of *London*, and ſo the Defendant run no hazard of loſing his Principal; the Lord *Keeper* thought fit to Decree, that the Defendant ſhou'd loſe the Premium of 40 *l.* and be contented with his Principal and Ordinary Intereſt: and now upon a Rehearing he confirm'd his former Decree.

Anonimus.

Caſe 258.

A *Jew* being to put in an Anſwer, upon a Motion it was Order'd, that he ſhou'd be ſworn upon the *Pentateuch*, and that the Plaintiff's Clerk ſhould be preſent to ſee him ſworn.

A *Jew* ordered to be ſworn to his Anſwer upon the *Pentateuch.*

Fitton

Caſe 259. ## *Fitton* verſus *Com' Mackelsfeild.*

Plaintiff allowed to bring a Bill of Review, without paying the Coſts decreed in the Original Cauſe, upon making Oath he was not worth 40 *l.* beſides the Matter in Queſtion.

UPON a Motion that a Bill of Review might be admitted, without Payment of the Coſts of the former Suit, amounting to 150 *l.* for which the now Plaintiff as was pretended had been in Execution almoſt 20 Years, and was not able to pay them.

Per Cur'. Upon his making Oath, that he is not worth 40 *l.* beſides the Matter in Queſtion, and beſides a Suit depending between the ſame Parties to foreclоſe a Mortgage, the Debt being pretended to be over paid, he ſhall be admitted to bring his Bill of Review without Payment of theſe Coſts.

Caſe 260. 7 Novembris. *In Court.* ## *William Merreitt* verſus *John Eaſtwicke* and *Anne* his Wife, Adminiſtratix of *Hugh Pearce.*

A having a Bill remitted to him from beyond Sea for a particular purpoſe, receives part of the Mony and takes a Note for the remainder, payable to himſelf or Bearer, and falling ill gives the Note to *B*, with orders to receive the Mony, and apply it to the Uſe it was deſigned, and then dies. *B* receives the Mony and applies it accordingly. The Adminiſtratix of *A* brings Trover and recovers. *B* brings a Bill, and is relieved.

THIS Day the Lord *Keeeper* being ſent for to the Tryal of the Mony in the *Pix*, Mr. *Baron Atkins* ſate and went on with the Cauſes. And this Cauſe then coming on to be heard, The Caſe was, that the *King* of *Denmark* ſent over the ſaid *Hugh Pearce* his Huntſman into *England*, and remitted to him a Bill of Exchange for 843 *l.* 13 *s.* 6 *d.* drawn upon one *Jacobſon* a Merchant in *London*, to buy Horſes and Dogs. He receives all the Mony except 200 *l.* and lays it out accordingly, and delivers up the Bill of Exchange, and for the other *two hundred Pounds* takes a Note from *Jacobſon*, payable to himſelf or Bearer on demand, and then falls ill, and ſhortly afterwards dyed; but in his Sickneſs delivers to the Plaintiff, in whoſe Houſe he lodged, this Note for 200 *l.* and orders him to lay out the Mony in Horſes and Dogs for the *King* of *Denmark's* Uſe:

Uſe: Which he accordingly does, and afterwards goes to *Denmark*, and carries over the Horſes and Dogs which had been bought, and accounts with the *King* for the Mony, and receives a Gratuity for his Trouble.

After the Death of *Hugh Pearce*, the Defendant *Anne* his Wife takes out Adminiſtration, and ſhe and her now Husband bring an Action of *Trover* againſt the Plaintiff for this *two hundred Pounds*, and recover a Verdict.

The Bill was to be relieved.

Upon hearing of the Cauſe, Mr. *Baron Atkins* was of Opinion the Plaintiff came too late after a Recovery at Law, and would have diſmiſſed the Bill: But Sir *Samuel Clarke*, Sir *Miles Cooke*, and Sir *William Beverſham*, the *Maſters* in *Chancery*, ſtood up and oppoſed it, being of Opinion, that there ought to be Relief and a Decree for the Truſt; and thereupon the Court being divided, no Order was made.

A Judge ſitting in the Abſence of the *Lord Keeper*, being about to make a Decree is oppoſed by the Maſters then preſent, whereupon the Cauſe is continued in the Paper.

And the Cauſe ſtanding in the Paper the next Day, came on to be heard before the *Lord Keeper*, who declared, that he was ſatisfied that the 200 *l.* received by the Plaintiff was part of the *Eight Hundred Forty Three Pounds, Thirteen Shillings* and *Six Pence* remitted by the *King* of *Denmark*; and altho' *Pearce* had altered the Property by taking a Bill for it payable to himſelf or Bearer, yet *Pearce* was to apply it for the *King* of *Denmark*'s Uſe, and the Plaintiff having made ſuch Proviſion as *Pearce* ſhould have done, ought not to be charged therewith as ſo much of the Eſtate of *Pearce*, he having accounted for the ſame; and it was ordered that all Proceedings at Law ſhould be ſtayed till further Order: and there being an Account decreed touching ſome other Moneys, which Plaintiff had received, the Judgment was ordered to ſtand a Security for what ſhould be found due from the Plain-

tiff on the Account; but if nothing ſhould appear to be due, Satisfaction was to be acknowledged on the Judgment.

Note, upon ſearching the Record of this Caſe it appears, that this Cauſe was heard before the *Lord Keeper* on the 8th of *November*, and ſuch Decree made as above; but it does not appear by the Record that this Cauſe had come on before Mr. *Baron Atkins* the Day before.

Caſe 261.
10 Novembris.
In Court. Lord Keeper.
Bill of Peace for preventing multiplicity of Suits proper.

New Elme Hoſpital verſus *Andover*

THERE having been time out of Mind a Fair held at *Weyhill* near *Andover*, which was within the Hundred and Manor, whereof the Corporation of *Andover* were Lords; But the Pickage and Stallage and other Profits of this Fair being enjoyed by Particular Tenants, who claimed ſeveral Acres of the Land on *Weyhill* (on which the Fair was held) as belonging to their reſpective Eſtates within the Manor; and other Part of the Soil and Profits being claimed by the Hoſpital of *New Elme*, and other Part by the Parſon of *Wey*; ſo that the Corporation had but little or none of the Profits of the Fair; The Corporation, upon ſurrendering of their old Charter, got a Clauſe inſerted in the New One, that they might hold the Fair in what Place they pleaſed, (which Mr. *Attorney* ſaid, was only an Explanation of what the Law implied upon the old Charter, the Fair being granted to them) and now for their own Profit they would remove it to another Place, the Soil whereof belonged to the Corporation; and hereupon ſeveral Actions being brought on both ſides, the Bill was brought againſt the Town of *Andover* by the Tenants of the Hoſpital and Parſon, to quiet them in their Poſſeſſion.

It was objected by the Defendants, that the Bill was not proper, the Right not having been ſettled by Law; for

tho' the Defendants had recovered in two ſeveral Actions, yet theſe Verdicts were both ſet aſide, as having been gained by a Practice upon, and undue Sollicitation of, the Jury; and the *Judges* had certified the Verdicts to have paſſed contrary to their Direction.

Lord Keeper. I take ſuch a Bill to be very proper in this Court, being a Bill of Peace, and in ſuch Caſe this Court ought to interpoſe and prevent Multiplicity of Suits: But in this Caſe the Bill praying only ſpecial Relief, *viz.* that they might be quieted in Poſſeſſion, till the Right was tryed at Law, and not having prayed Relief in the Premiſſes or a perpetual Injunction, the *Lord Keeper* thought the Bill not proper for a Decree; and directed the Plaintiffs to amend the Bill in that Particular. And the Town of *Andover* having a Bill to change the Venue, complaining that they could not have a fair Tryal in the County where the Action was laid, that Bill was diſmiſſed.

Bill to change a Venue diſmiſſed.

Chapman verſus *Tanner.*

Caſe 262.

Eodem die.

In Court Lord Keeper.

A Bankrupt, before he became ſuch, having made a Mortgage of his Eſtate, the Aſſignees of the Statute bring an Ejectment for Recovery of the Lands comprized in the Mortgage. The Mortgagee refuſes to enter, but ſuffers the Bankrupt to take the Profits, and to fence againſt the Aſſignees with this Mortgage.

Mortgagor becomes a Bankrupt, and the Mortgagee refuſes to enter, and permits the Bankrupt to continue in Poſſeſſion, and to fence againſt an Ejectment brought by the Aſſignees, with this Mortgage.

Lord Keeper. The Mortgagee ſhall be charged with the Profits from the time of the Ejectment delivered.

Mortgagee ſhall be charged with the Profits from the time of the Ejectment.

Another Point in this Caſe was, that the Bankrupt having bought Land, and all the Purchaſe-mony not being paid, the Aſſignees would have had the Vendor come in as a Creditor under the Statute, for the Remainder of his Purchaſe-mony.

Ante Caſe 251. *Poſt Caſe* 263.

Per

A fells Land to *B*, who afterwards becomes a Bankrupt, part of the Purchase-mony not being paid.

Per Cur'. In this Case there is a natural Equity, that the Land should stand charged with so much of the Purchase-mony as was not paid; and that, without any special Agreement for that Purpose.

A shall not be bound to come in as a Creditor under the Statute, but the Land shall stand charged with the Mony unpaid, tho' no Agreement for that Purpose.

Case 263.

11 Novembris.

In Court Lord Keeper.

Barrell versus *Sabine*.

What Circumstances may induce the Court to make an absolute Conveyance redeemable or not.

UPON the hearing this Cause, the single Question was, Mortgage or no Mortgage; and it being before the Statute of *Frauds* and *Perjuries*, for Proof of its being a Mortgage, it was urged for the Plaintiff, *first*, the over Value, *viz.* that it was a Church Lease of 180 *l. per Ann.* over and above the Rent reserved and all Reprises, and renewed at the time of the pretended Purchase, and made up a compleat Term for 21 Years. And Mr. *Serjeant Barrell*'s Purchase-mony was but 950 *l.* of which not one Penny came to the Vendor's Hands, but all went for discharging Incumbrances, and in Repairs and renewing the Lease; and that the Defendant was offered much about the same time for this Lease 1400 *l.* *Secondly*, that *Sabine* was at the Charge of the Conveyance. *Thirdly*, that Serjeant *Barrell* should declare, if *Sabine* would repay his Mony within a Year and half, and give the *Serjeant* 100 *l.* for his Pains, *Sabine* should have his Estate again; and to prove that such a Declaration was sufficient to make it a Mortgage, they cited the Cases of *Cole* and *Martin*, and *Beale* and *Collins*.

On the other Side it was answered, the over Value was not so great as was pretended, and that this had all the Forms and Steps of an absolute Purchase; there being first express Articles for an absolute Purchase, and then a Conveyance made in pursuance of those Articles, and Possession delivered immediately upon Execution of the Conveyances.

The

The *Lord Keeper* ſaid, he was fully ſatisfied, that it was not originally a Mortgage, but an abſolute Purchaſe: But believed *Sabine* might complain he had ſold his Eſtate too cheap, and that thereupon Mr. Serjeant *Barrell* might declare, if he would repay him his Mony within one Year, and give him 100 *l.* for his Pains, that he ſhould repurchaſe his Eſtate, which *Lord Keeper* believed was the true State of the Caſe: And cited Sir *Anthony Cage*'s Caſe of a Clauſe to repurchaſe, which made ſo much ſtir in *Weſtminſter-Hall*: And ſaid, he thought that where there was a Clauſe or Proviſion to repurchaſe, the Time limited ought to be preciſely obſerved; and ſaid, that as to the *Serjeant*'s Agreement, that *Sabine* might repurchaſe for 100 *l.* more, that ſeemed reaſonable in reſpect of his Trouble, and for that the Eſtate was the more valuable, as having gone through a Lawyer's Hands, who underſtood the Title, and *that* might be a means to encourage Purchaſors. And diſmiſſed the Bill.

Where there is a Clauſe or Proviſion in the Conveyance, for the Vendor to repurchaſe, the time limited for that Purpoſe ought to be preciſely obſerved.

Baily verſus *Devereux*.

Caſe 264.

13 Novembris. *In Court Lord Keeper.*

UPON a Motion for an Injunction, the Caſe was; that an Action of Aſſault, Battery, and falſe Impriſonment was brought at Law againſt the Plaintiff for Arreſting the Defendant on a Commiſſion of Rebellion, which iſſued irregularly.

This Court will not ſuffer a Man to be Sued at Law for executing the Proceſs of the Court, tho' it iſſued irregularly.

Per Cur'. The Plaintiff muſt have an Injunction; for the Irregularity ought to be puniſhed in this Court, and can only be examined and determined here, whether regular or not; for at Law, ſuppoſing the Commiſſion of Rebellion iſſued regularly, they will not allow *that* as a Juſtification; and therefore the Injunction was granted; and it was referred to a Maſter to examine whether the Commiſſion of Rebellion iſſued regularly or not; and in caſe he found it irregular, to tax the Defendant his Coſts.

Caſe 265. 14 Novembris. *In Court Lord Keeper.*

Coppring verſus *Cooke*: & *Cooke* verſus *Knight* & *al'*.

Mortgagee enters, and thereby prevents ſubſequent Incumbrancers from entring, and yet permits the Mortgagor to receive the Profits.

He ſhall be charged with all the Profits he had or might have received ſince his Entry. *Ante Caſe* 251, & 262.

BILL to redeem a Mortgage. The Caſe was, that the Mortgagee had obtained Judgment in Ejectment, and entered on the Mortgaged Premiſſes, and thereby prevented other Creditors that had ſubſequent Securities from entring, and yet permitted the Mortgagor to take the Profits; and now the other Creditors coming to redeem him, the Court ordered the Mortgagee ſhould be charged with all the Profits he had, or might have received ſince his Entry.

Tyle verſus *Tyle*.

Caſe 266. 17 Novembris. *In Court Lord Keeper.*

Black Acre is deviſed to *J. S.* with a Proviſo, that if he be evicted, he ſhall have White Acre: *J. S.* is evicted of a Moiety of Black Acre.

He ſhall only have a Satisfaction *pro tanto* out of White Acre.

A Man by Will deviſes Lands called *Styles*, to his younger Son, and thereby declares, that in caſe his Son ſhould be any way hindered or prevented from enjoying the Lands called *Styles*, then in lieu thereof he gave him all thoſe his Lands called *Barra Bar*.

The Plaintiff by his Bill ſets forth, that he was the Heir of the Deviſor, but that neither he, nor in truth the Deviſor, was intitled to more than to one Moiety of the Lands called *Styles*, and that the Defendant *I. N.* a Stranger was intitled to the other Moiety, and had evicted the Deviſee: And ſets forth that *Barra Bar* was of much greater Value than *Styles*, and that it was not through his default, that the Deviſee did not enjoy *Styles*; and charged a Combination betwixt the Deviſee and the other Defendant *J. N*; and prayed Relief as to the over Value of *Barra Bar*.

8

The

The *Lord Keeper* was clear of Opinion, that this being a Condition, that lay in Compenſation, the Plaintiff ought to be relieved; and Decreed, that the Defendant the Deviſee ſhould have a Compenſation, for the Land evicted, ſet out in *Barra Bar*, and that the Plaintiff ſhould be relieved as to the over Value. But the Defendant *I. N.* that had the other Moiety of *Styles*, having all along fomented Suits on both Sides, and the Court threatening to ſaddle him with Coſts, he ſubmitted, that the Defendant the Deviſee ſhould have his (*I. N.*) Moiety of *Styles*, and he to take a Compenſation out of *Barra Bar*: and it was Decreed accordingly.

Cotton verſus *Iles.*

Caſe 267.
19 Novembris.
In Court Lord Keeper.

A Man purchaſes abſolutely of a Mortgagee in Fee in poſſeſſion, and dies. As between his Heir and Executor it ſhall be conſidered as real Eſtate and go the Heir.

MORTGAGEE in fee enters for a Forfeiture, and after ſeven Years Enjoyment abſolutely ſells the Land to *I. S.* and his Heirs.

Per Cur'. The Eſtate ſhall not be looked on to be a Mortgage in the Hands of *I. S.* ſo as to make it part of his Perſonal Eſtate, but it ſhall be for the Benefit of the Heir.

Johnſon Executor of Hill verſus *Nott.*

Caſe 268.
Eodem die.
In Court Lord Keeper.
Ante Caſe 161.

If an Heir ſells a Reverſion in the life of his Father at an under Value, the Court will not in favour of ſuch a Purchaſor decree a ſpecifick Performance of a Covenant for further Aſſurance.

HILL bought of the Defendant *Nott* in the Life-time of Sir *Thomas Nott* his Father the Reverſion of a Houſe at *Richmond* at an under Value, by reaſon of the Contingency, that if the Defendant *Nott* had died in the Life-time of Sir *Thomas* his Father, *Hill* had loſt all his Purchaſe Mony; and after the Death of Sir *Thomas Nott*, who died about ten Years after this Contract was made, *Nott* brought his Bill to be relieved againſt the Bargain, and was relieved by *Lord Nottingham*, but upon a Rehearing before the *Lord Keeper* that Decree was reverſed.

Now

Now this Bill was brought by *Johnſon* the Executor of *Hill*, ſetting forth that *Nott* the Defendant was only Tenant in Tail, and had covenanted to make further Aſſurance, and prayed he might be compelled to perform his Covenant in *Specie*, and be Decreed to levy a Fine.

Upon the Hearing the *Lord Keeper* denied the Plaintiff any Relief, and ſaid upon the firſt Hearing on *Nott*'s Bill he thought it a hard Caſe, tho' he did not ſee ſufficient Reaſon to ſet aſide the Contract: But as to the Plaintiff's Bill he ſaid a Contract which carries an Equity to have it Decreed in *Specie*, ought to be without all Objection; and ſaid the Practice of purchaſing from Heirs was grown too common, and therefore he would not in any Sort countenance it; and dimiſſed the Bill, and left the Plaintiff to bring his Action of Covenant at Law.

Plampin verſus *Betts*.

Caſe 269.
20 Novembris.
Lord Keeper.
A Decree, whereby the Defendant was to be concluded by the Plaintiff's own Oath, reverſed.

ON a Demurrer to a Bill of Review. The Plaintiff by his original Bill ſuggeſts, that all Receipts touching the Dealings in queſtion were loſt, and prays an Account and Diſcovery from the Defendant. The Defendant in his Anſwer ſets forth his Books of Account and his Receipts and Payments; and ſwears, he received no other Mony of the Complainant's.

After this the Plaintiff produces his Receipts, which differ, as to the Dates, from the Entries in the Books of Account ſet out by the Defendant in his Anſwer: and after many Wrangles in taking the Account, an Order was made by the Lord *Chancellor Nottingham*, that in caſe the Plaintiff would make Oath that he believed the Sums in Queſtion to be diſtinct Sums, they ſhould be taken as ſuch. And *this*, as alſo that the Plaintiff's Oath in ſome other Caſes ſhould conclude, was the Error aſſigned; And

for that Reaſon the Decree was reverſed; the *Lord Keeper* ſaying, there was no Colour to make ſuch an Order; but if there had been ſufficient Evidence without, and the Oath had been *ex abundanti* only, it had been otherwiſe.

Puſey verſus *Puſey.*

Caſe 270.

Eodem die.

In Court Lord Keeper.

Land held by the Tenure of a Horn. Bill brought by the Heir for the Horn.

BILL was, that a *Horn*, which Time out of Mind had gone along with the Plaintiff's Eſtate, and was delivered to his Anceſtors in ancient time to hold their Land by, might be delivered to him; upon which *Horn* was this Inſcription, *viz. Pecote this Horne to hold Huy thy Land.*

The Defendant anſwered as to Part, and demurred as to other Part; and the Demurrer was, that the Plaintiff did not by his Bill pretend to be intitled to this *Horn*, either as Executor or Deviſee; nor had he in his Bill charged it to be an *Heir loome.*

The Demurrer was over-ruled, becauſe the Defendant had not fully anſwered all the particular Charges in the Bill, and was ordered to pay Coſts. And the *Lord Keeper* was of Opinion, that if the Land was held by the Tenure of a *Horn* or *Cornage*, the Heir would be well intitled to the *Horn* at Law.

Vid. 1. Inſt. 107. a.

Sherbone verſus *Clerk.*

Caſe 271.

Eodem die.

In Court Lord Keeper.

Vid. ante Caſe 210.

DEmurrer to a Bill brought to diſcover the Tenant to the *Præcipe* on a voluntary Conveyance, allowed.

Smith verſus *Turner.*

Caſe 272.

Eodem die.

UPON a Bill of Review the Error aſſigned was, that there was no ground for making this Decree,

more than that it is mentioned in the Decree, that it was made by the Conſent of the Plaintiff's Council, and he ought not to be concluded by the Conſent of his Council: And that was allowed to be a good Error: As alſo that the Decree was made by the *Maſter of the Rolls* alone, and he cannot by his *Commiſſion* make a Decree without the Aſſiſtance of two *Maſters*.

Note, This Caſe not being warranted by the Record, it is thought fit to inſert the Words of the Record it ſelf, which are as follow, *viz.*

Lord Keeper. *Jovis Viceſſimo Die Novembris, Anno Regni Carol' Secundi Regis Triceſſimo Sexto, inter Edwardum Smith Barr' Quer'. Annam Turner Vid. Defend.'*

THE Matter upon the Plea and Demurrer put in by the ſaid Defendant to the Plaintiff's Bill of *Review*, coming this Day to be heard and debated before the Right Honourable the *Lord Keeper* of the Great Seal of *England*, in the Preſence of Council learned on both Sides, upon opening the Matter of the ſaid Defendant's Plea, which is grounded on a Submiſſion or Conſent of the now Plaintiff *Smith*'s Council to a Decree made in a former Cauſe, wherein the Defendant *Turner* was Plaintiff, and the now Plaintiff *Smith* Defendant, and therefore the Decree in the former Cauſe, againſt which the Plaintiff's Bill of *Review* ſeeks Relief, being grounded on a Conſent, ought not to be Impeached or Prejudiced by the now Plaintiff's Bill. Upon Debate of the Matter of the Bill, Plea and Demurrer, this Court held the ſaid Plea and Demurrer to be good and ſufficient, and doth order, that the ſame do ſtand and be allowed.

Lloyd

Lloyd verſus *Gunter.*

Caſe 273.

Eodem die.

Defendant cannot plead after a Proclamation returned.

Nor can a Plea be taken upon a general Commiſſion to take the Anſwer only.

THE Defendant had pleaded a former Decree in Bar to the Plaintiff's Bill: But the Plea was not ſuffered to be opened, for that it came in after a Proclamation returned; and alſo came in by a general Commiſſion which was to take the Anſwer only, and not to plead Anſwer or Demur.

Hills & al' verſus *Univerſitat. Oxon. & al'.*

Caſe 274.

24 Novembris.

In Court Lord Keeper.

How far the *Univerſity* of *Oxford*'s Privilege of Printing Bibles, *&c.* extends.

IN the *eighth* Year of King *Charles* the *firſt*, there was a Patent granted to the Univerſity of *Oxford* to print Bibles and other Books not prohibited. 30 *Martij* 8 *Car'* that Patent is confirmed, and limits, that there ſhall be but two Preſſes and three Printers. The Plaintiffs claim as the *King*'s Printers, under ſeveral Patents continued down by meſne Aſſignments, and bring their Bill to reſtrain the Defendants from Printing Bibles, *&c.* And it was obſerved, that the *Bible* was Tranſlated at the *King*'s own Charge; ſo that the Copy was his; and that Printing was brought in by *Henry* 6th at his own Charge.

The *Lord Keeper* was of Opinion, that it was never meant by the Patent to the *Univerſity*, that they ſhould print more than for their own Uſe, or at leaſt but ſome ſmall number more, to compenſate their Charge: But as they now manage it, they would engroſs the whole Profit of Printing to themſelves, and prevent the *King*'s Farmers of the Benefit of their Patent: However he ſaid, the Validity of the ſeveral Patents was a Matter proper to be determined at Law, and the Plaintiffs were now proper only for a Diſcovery, and therefore ordered that the Plaintiffs ſhould bring an Action at Law in the *Kings-Bench*, againſt the *Univerſity*, or the Defendants *Parker* and *Guy* who

claimed under the Patent to the *Univerſity*, and that it ſhould be tryed at the Bar; and the Defendants were to admit they had printed a competent number of Bibles at the Tryal. And tho' the Plaintiffs preſſed much for an Injunction to ſtay the *Univerſity* Printers from going on with the Printing of Bibles until the Tryal had ſettled the Right, yet the *Lord Keeper* refuſed to grant it, in regard that in caſe the Right ſhould be found with them, they would by ſuch Prohibition receive a Prejudice, that he could not compenſate nor make good to them.

Vid. ante Caſe 109.

Caſe 275.

Eodem die.

Newhouſe verſus *Milbank.*

Prohibition to an inferior Court for holding Plea of a Matter out of their Juriſdiction.

A Prohibition granted to an inferior Court upon a Suggeſtion, that they held Plea of a Matter out of their Juriſdiction.

Caſe 276.

27 Novembris.

Lord Keeper.

Bartholemew verſus *Meredith* alias *Moorehead.*

Lands deviſed to be ſold for Payment of Portions, one of the Children dies after the Portion becomes due, and before the Land ſold, the Adminiſtrator is intitled to the Mony.

J. S. by Will deviſes Land to be ſold for Payment of Portions to his younger Children; one of the Children dies after the Portion becomes payable, but before the Land ſold.

Per Cur'. The Adminiſtrator of the Child that is Dead, is intitled to the Mony.

Caſe 277.

Eodem die.

Palmer verſus *Young.*

Three Leſſees of a Church Leaſe.

One renews in his own Name. It ſhall be a Truſt for all.

ONE of the three that held a Leaſe under a Dean and Chapter, ſurrenders the old Leaſe and takes a new one to himſelf.

Per Cur'. It ſhall be a Truſt for all.

Attorney General verſus *Vernon*, *Brown*, and *Boheme*. Caſe 278.

THE Bill was, that his Majeſty, in right of his Dutchy of *Lancaſter*, was ſeized of the Honour of *Tudbury*, the Forreſt of *Needwood*, and of many other particular Lands in the Bill ſpecified, and that the Defendants had intruded and committed Waſte; ſometimes alledging the Lands deſcended to them or ſome of them from their Anceſtors; at other times pretending a Grant thereof from his Majeſty: Whereas if there was any ſuch Grant, it was obtained by Surprize, and by falſe Particulars; many things being omitted or not valued, and thoſe that were valued, were much under-valued, and that it did not paſs in the uſual Form of Grants of Inheritance under the *Dutchy* Seal; and that Endeavours were uſed to ſtop the Grant, but without Effect.

Bill in Equity lies to ſet aſide Letters Patents obtained by Fraud.

To this Bill or Information the Defendants pleaded, that they had paid to his Majeſty 7000 *l.* in Mony, and had conveyed to him the Lands, whereon the Fort of *Sherenеſſe* was built, and that in Conſideration thereof, and of the King's ſpecial Grace and Favour, by Letters Patents under the *Dutchy* Seal, executed by Livery, in Purſuance of a Warrant under the *King*'s Signet or Sign Manual, his Majeſty did grant to Defendants *Brown* and *Boheme* in the Words following, (and then ſet out the Letters Patent) and the Defendant *Vernon* averred, that, tho' the Patent paſſed in the Name of the other Defendants, yet *that* was done to prevent a Merger of ſeveral Leaſes, he had in part of the Premiſes, and that, as he believed, the Grant was intended in favour of him, who had ſerved his *Majeſty* and the late *King* with the Hazard of his Life, and had ſuffered much for them, both in his Perſon and his Eſtate; and that therefore, and for that Letters Patents could not be avoided by an *Engliſh* Bill, but the Matter

in Queſtion was properly at Law, and ought to be determined in the *Dutchy*; and that, as the Defendants were Purchaſors, Equity ought not to avoid their Grant, or to put them to diſcover matters in avoidance of it.

And by the Defendants Council it was inſiſted, *firſt*, That there never had been any Precedent of this nature to repeal Letters Patents by an *Engliſh* Bill in *Chancery*; but as to that, it was *Cauſa primæ Impreſſionis*. *Secondly*, That a Title under Letters Patents is a Title purely at Law, and determinable there, and that likewiſe there is a proper Remedy by *Scire fac'*. *Thirdly*, As there was no Precedent of any ſuch Bill, ſo it was Impracticable to proceed here, for that the Letters Patents pleaded, and all other Letters Patents, are matter of Record, and cannot be diſannulled, but by a Matter of as high a Nature: and the *Engliſh* Side of the Court of *Chancery* is no Court of Record; and therefore Letters Patents cannot, neither can a Fine, be vacated or cancelled by a Decree on an *Engliſh* Bill: but if any Thing could be done on ſuch Bill; at moſt it could be, but to decree a Reconveyance; and that was not prayed by the Bill. *Fourthly*, It was obſerved, that the word *Fraud*, which, if any Thing, muſt give Juriſdiction to the Court in this Caſe, was not in the whole Bill; for that the whole Charge of the Bill goes but to two Things only, *viz. Firſt*, That the Patent paſſed overhaſtily, and had not its due Progreſſion through all the Offices, as in the Caſe of a Grant of an Inheritance under the *Dutchy* Seal, according to the Uſage of that Court, it ought to have had. And *Secondly*, That this Grant was obtained by Miſinformation and falſe Particulars, or at leaſt that his Majeſty was not duly and fully apprized of the Value of the Lands, when this Grant paſſed.

As to the firſt of theſe Objections it was ſaid, that the Grant paſſed duly, or not; if not, that would avoid the Grant at Law: and the Uſage of the *Dutchy* Court

Court is moſt properly determinable there: but if it paſſed regularly and according to Law, there could be no Objection upon that Account againſt it in Equity: And it was urged further, that tho' it might be reaſonable, where there is a general Warrant for a Grant, that it ſhould paſs through all the proper Officers Hands, to the intent they might examine, and take care, that the Grant be not larger or more comprehenſive than his Majeſty intended it: yet where there is a Warrant to paſs a Patent in *hæc verba*, (as in this Caſe there was) there the Particulars and Manner of the Grant is fixt and aſcertained by the Warrant, and there needs no ſuch Care or Scrutiny of the Officers about it.

As to the ſecond Objection; it was ſaid, it had never yet been thought a Reaſon ſufficient to avoid the *King*'s Grant, becauſe he did not receive a Conſideration adequate to the Value of the Land: For *Kings* are ſuppoſed to be bountiful, and not to make a bare *Smithfield* Bargain: And tho' it ſhould appear upon an Examination in this Court that there was an over Value, yet that would be no Reaſon to avoid this Grant, for that the Grant is not only in Conſideration of the 7000*l.* in Mony paid, and of the Conveyance of the Lands at *Shereneſs*, but alſo of the *King*'s ſpecial Grace and Favour; and the Defendant *Vernon* has by his Plea ſhewn himſelf to be a Perſon, who had ſome Title to the *King*'s Favour; he having ſerved his Majeſty and the late *King* with the hazard of his Life, and ſuffered for their Service both in his Perſon and in his Eſtate; and expreſsly avers, that the Patent was intended in favour of him, tho' not taken in his Name, to prevent a Merger of his Leaſes: And then when the Value ſhall appear, how much ſhall be ſaid to paſs in reſpect of the *King*'s Bounty, and how much in reſpect of the Conſideration paid? Certainly whatever the over Value ſhall be, it ought to be imputed to the *King*'s Bounty; Unleſs the Law had preſcribed Limits (which it hath not) to the *King*'s Grace and Favour. And it was further obſerved, that the Defendant *Vernon* had ſeveral long

Leaſes of part of the Premiſſes, and in thoſe Leaſes the Rents reſerved were thought a good Conſideration; and thoſe Leaſes were not yet impeached; and not only the ſame Rents were continued, but an increaſe of Rent was reſerved on the Grant of the Inheritance: and ſo the ſame Conſideration goes to that too. *Fifthly*, That there was a Particular *Non obſtante* in the Patent, that it ſhould not be Impeach'd for miſtaking, or not mentioning the Values; and a Covenant for further Aſſurance, in caſe the Grant was any way defective; and that the force of ſuch a *Non obſtante* was properly determinable at Law. *Sixthly*, If Letters Patents ſhall be impeached by Engliſh Bill in *Chancery* upon ſuch Suggeſtions and Pretences as theſe, no Patentee can be ſafe; nor ſhall the *King*'s Seal be of any force; and unleſs the utmoſt Conſideration was paid, the Grant ſhall be open to the beſt Bidder; and after never ſo long an Enjoyment the Patentee ſhall be called in here, and entangled in Proofs of the Values of the Lands granted: And ſince *nullum Tempus occurrit Regi*, nothing hinders but they may go back and repeal Letters Patents made by *King James*, or as much farther back as they pleaſe. *Laſtly*, The Defendants were Purchaſors, and had pleaded themſelves ſo to be; and 7000*l.* was actually paid, and their Lands at *Shereneſs* conveyed to the *King*; and therefore, as Purchaſors, they were intitled to the Protection of the Court; and in caſe their Grant was defective, they might poſſibly have an Equity to have it ſupplyed here: but there was no Equity to deſtroy a Purchaſor's Grant; neither was it the Practice of this Court to compel a Purchaſor to anſwer Matters, whereby to impeach his Grant; and if the Defendants ſhould be forced ſo to do, the Conſequence thereof might be, to ſtrip them of their Purchaſe, and yet be left without Remedy for the Conſideration paid, and Lands conveyed.

For the *King* it was inſiſted by the Counſel, *firſt*, That in this Caſe a bare Purchaſe was intended, and not a Gratuity; and that the Letters Patent were obtain'd in reſpect

reſpect of the Conſideration paid, and not as of the King's Bounty; for that would have much alter'd the Caſe.

Secondly, As it was intended a Purchaſe only; ſo it was unduly obtain'd by falſe Particulars: and it was no ſmall Evidence of the Fraud, that it was carried on in ſuch Haſte, and by ſuch unuſual Methods.

Thirdly, That the *King* in this Caſe was properly relieveable in this Court by *Engliſh* Bill. *Firſt*, For that the *King* may ſue in what Court he pleaſes. *Secondly*, The Bill charges a Surprize and falſe Particulars; and a Fraud is properly relieveable here. *Thirdly*, That the *King* ought not to be in a worſe Condition than a Subject; and a *Nobleman* ſhall be relieved for ſuch a Fraud put upon him by his Servant: and in caſe the *King* ſhall not be relieved in this Caſe by an *Engliſh* Bill, he will be without Remedy. *Firſt*, For that there is no Remedy to be had in the *Dutchy* Court; for that is only a Court of *Revenue*, and not a Court of *Law*; and for that cited *Owen* and *Holt*'s Caſe in my Lord *Hobart*, fo. 77. and the Caſe of *Dowty* and *Fiſher* in the *King's-Bench*; and beſides the Complaint of the Bill was, that the *Chancellor* of the *Dutchy* had not done well in this Matter. *Secondly*, As this Caſe was, the *King* could have no Remedy by *Scire fac'* for that theſe Patents were no Record of this Court; and for that in a *Scire fac'* the Deceit ought to appear within the Body of the Patent; but the Matters upon which the Bill ſeeks Relief are Frauds in obtaining the Grant, and Matters *dehors* the Patent. 1 Vent. 155.

Fourthly, They ſaid, there could be no ſuch Danger, as was pretended, to ancient Patents; for that the Equity will not be the ſame againſt an ancient Patent, where there has been a long Enjoyment under it, as againſt a Patent newly paſſed, and freſh in Agitation: And as to ancient Patents, it ſhall be preſumed the *King* intended a Bounty, which will alter the Caſe. As to what has been urged,

that there was no Precedent for ſuch an *Engliſh* Bill, it was ſaid, there is no Precedent of any Grant of ſuch Value paſſed on ſuch Conſideration.

Lord Keeper. The Queſtion is ſhort, Whether there be a Fraud, or not? if a Fraud, it is properly relievable here. It is not fit ſuch a Matter as this ſhould be ſtifled upon a Plea; and therefore the *Lord Keeper* over-ruled the Plea, and denied to ſave the Benefit of it till the Hearing, becauſe he would not give any Countenance to ſuch a Caſe.

Caſe 279.

Elme verſus *Shaw.*

8 Decembris. *In Court Lord Keeper.*

DEmurrer allowed, but without Coſts, becauſe it was a Demurrer only, without any Anſwer, and came in by Commiſſion.

Caſe 280.

Goffe verſus *Whalley.*

Eodem die.

Mony raiſed by the Heir by Sale of Real Aſſets before Original filed, if Aſſets in Equity.

BILL brought againſt an Heir to diſcover what Aſſets he had by Deſcent, and to ſubject Mony raiſed by Sale upon Alienation before any Original filed, and to diſcover the truſt of Lands deſcended before the Statute of *Frauds* and *Perjuries*, which makes the Truſt of an Eſtate deſcended Aſſets.

The Defendant pleaded Alienation before Original filed, and that the Truſt of an Eſtate deſcended was not Aſſets in his Hands.

But the *Lord Keeper* ordered he ſhould anſwer, ſaving the Benefit of his Plea to the Hearing.

Anonimus.

Anonimus.

Case 281.

Sums under 40 *s.* allowed on the Party's own Oath, but then he ought to ſwear, when, and to whom, and for what they were paid.

SUMS under 40 *s.* to be allowed the Party on his Oath, but then he muſt in his Affidavit mention unto whom paid, for what, and when.

Dan verſus *Allen.*

Case 282.

1 Decembris. *Lord Keeper.*

An Aſſignee can't bring a *Scire fac'* to revive a Decree, unleſs the Decree be Inrolled.

PER *Cur'*. An Aſſignee ſhall not have a *Scire fac'* to revive a Decree that is not Signed and Inrolled: But after the Decree is Inrolled, an Aſſignee may bring a *Scire fac'* to revive it: In like manner as at Law, if there be Judgment for an Annuity, and the Annuitant afterwards ſells the Annuity, the Vendee ſhall have a *Scire fac'* upon this Judgment. But tho' the *Lord Keeper* diſallowed the *Scire fac'* yet it was without Coſts, becauſe the Defendant might have Demurred, but did not.

SIR Harbottle Grimſton, Maſter of the Rolls, *died about* three *o'Clock in the Morning on the* ſecond *Day of* January, *in the* eighty firſt *Year of his Age, being ſeized ſuddenly in the Night with a kind of an Apoplectick Fit, of which he continued ill about* four *Days, and then dyed; and was about three Days afterwards carried privately out of Town to be Buried at* Gorhambury. *Upon his Death the* Lord Keeper *took the Keys of the* Rolls *into his Cuſtody, until Sir* John Churchill *was appointed* Maſter of the Rolls, *and Sworn privately at his* Lordſhip's *Houſe.*

DE
Termino S. Hillarii,

36 & 37 *Car' II.* 1684.

In Curia Cancellariæ

Cafe 283. 24 Januarii. *In Court Lord Keeper.*

Sir Robert Jaſon verſus *Elizabeth Jervis* Widow & *al'*

A covenants, that in conſideration of 1200*l.* he and all claiming under him will convey to *B*, or pay back the Mony. A Conveyance is made, and then *B* is evicted by a Jointreſs, who claimed under a Settlement made by her Husband the former Owner of the Eſtate. *B* makes the Jointreſs his Executrix, and dies. *A* ſhall pay back the Mony, and the Executrix of *B* ſhall have it and her Jointure too.

Nathaniel Bacon, the Defendant *Elizabeth*'s former Husband, who headed the Rebellion in *Virginia*, was Owner of the Lands in Queſtion, and contracts with the Plaintiff *Jaſon* to ſell him the Lands for 1200*l.* *Jaſon* has not Mony to pay for the Purchaſe; but confeſſes a Judgment of 4000*l.* Penalty, defeazanced for Payment of the Conſideration Mony to *Bacon*; and thereupon *Bacon* conveys the Lands to him and one *Pheaſant* his Truſtee. *Thomas Jervis* contracts with *Jaſon*, *Pheaſant* and one *Bucknam* for the Lands for 1200*l.* and *Jaſon*, *Pheaſant* and *Bucknam* enter into a Statute, that in Conſideration of 1200*l.* they and all claming by, from or under them, or any or either of them, would convey the ſaid Lands unto *Jervis* and his Heirs, free from all Incumbrances done or ſuffered by them, any or either of them; and that *Bucknam*, who was in poſſeſſion, ſhould deliver Poſſeſſion unto *Jervis*, or in default thereof the 1200*l.* was to be repaid.

Bacon dies in *Virginia*, and after his Death his Wife and Children ſet up a Settlement by which *Bacon* was only Tenant in Tail, and by Vertue of this Settlement they

they evict the Estate from *Jervis*, who afterwards dies, and makes the Defendant *Elizabeth* his Executrix.

For the Plaintiff it was insisted, that altho' there was a general Covenant to convey, yet it was restrained by the special Words that come afterwards, *viz. free from all Incumbrances done by them, any or either of them*: And a Covenant by the Word *concessi*, may be restrained by a subsequent special Covenant: And it appears by the whole Contexture of the Agreement, that the Intent of the Parties was only, that *Jervis* should take *Bacon*'s Title, *talis qualis*, and he by a Recovery might have cut off the Remainders, and have made a good Title. And this is a Case of very great Extremity; for the Wife of *Bacon* and her Children run away with the Land by vertue of this Settlement; and she likewise will have the 1200*l.* Consideration-mony, as Executrix to *Jervis*.

Lord Keeper. I take the Covenant to convey to be a general Covenant, and it cannot be supposed, that when a Man buys the Inheritance of an Estate, he intended, that those he bought of should convey an Estate for Life only. And as to the other Objection, that it would be a strange Case for *Bacon*'s Wife to have both the Mony and the Land too; there is no Weight in that Objection; for she has an Estate for Life in the Land by the Settlement; and she has the Mony as Executrix to *Jervis*: *Et quando duo jura in uno conveniunt, æquum est, ac si essent in diversis.*

But then the Plaintiffs Council pressed, they might be admitted to try again the Reality of this Settlement, whether it was not fraudulent; the former Tryals having been in *Bucknam*'s Name, who was a known Cheat, and his Name cast an Odium on the Cause.

Whereupon it was ordered they should try it next *Assizes* in an Ejectment; and first against the Wife, as to her Estate for

A Bond before Marriage to settle a Jointure, and afterwards a Settlement is made which settles the Eſtate on the Wife and the Iſſue of the Marriage. Purchaſor.

Life; and then as to the Remainders to the Children: For if the Bond before Marriage was only for a Jointure, and the Settlement goes further, and entails the Land upon the Children of the Marriage, the Settlement might be good as to the Jointure, and fraudulent as to the Remainders in Reſpect to a Purchaſor.

This Settlement is good as to the Jointure, but fraudulent as to the Children in Reſpect of a

Caſe 284.

Preſton verſus *Tubbin.*

Eodem die.

In Court.

What ſhall be reckoned a ſufficient *Lis pendens*, and what not.

WHERE a Man is to be affected with a *Lis pendens*, there ought to be a cloſe and continued Proſecution. In this Caſe the Bill was to compel the Father to perform Articles made on his Son's Marriage; the Father Mortgages the Land, that was to be ſettled, pending the Suit; and the Mortgagees are thereupon made Parties, and then the Father dies.

Lord Keeper. Here the *Lis pendens* is well enough; for the Plaintiff being Heir, he cannot revive the Suit againſt himſelf.

It was ſaid by Mr. *Sollicitor*, that where there is a *Lis pendens*, as if a Man has exhibited his Bill to have Articles performed, there he may by an original Bill affect a third Perſon with Notice of the firſt Suit, that ſhall come in and purchaſe the Eſtate pending that Suit; and that there are forty Precedents of it in this Court; for otherwiſe, tho' a Man has proceeded never ſo cautiouſly, and immediately exhibited a Bill to have Articles performed; yet a Stranger may come in, in the mean time, and prevent him of the Eſtate.

But that was denied by Mr. *Keck*, and by the Court; who ſaid, that with actual Notice you may affect any one by an original Bill; but as to Notice purely by a *Lis pendens*

dens you ſhall not affect any one, who is no Party to the Suit by an Original Bill; unleſs the former Cauſe has Proceeded to a Decree: and there is not that danger in the Caſe, as Mr. *Sollicitor* apprehends; for if the firſt Suit be Proceeded in with effect; all Perſons that come in *pendente lite* tho' they be no Parties to the Suit, their Intereſt ſhall be Bound, and avoided by the Decree in that Cauſe.

And the Lord *Keeper* ſaid, tho' notice to a Man's Council be notice to the Party; yet where the Council comes to have notice of the Title in another affair, which it may be, he has forgot, when his Client comes to adviſe with him in a Caſe with other Circumſtances; that ſhall not be ſuch a Notice, as to bind the Party.

Where Notice to the Parties Council, is Notice to the Party.

Fitton verſus *Com' Macclesfield.*

Caſe 285.
26 Januarii.
In Court Lord Keeper.

THE Plaintiff *Fitton* having brought a Bill of Review to reverſe a Decree made by the Lord *Chancellor Clarendon*, about 22 Years ſince, the Defendant the Lord *Macclesfield* Demurr'd, and alſo Pleaded to the Bill of Review.

No Limitation of Time for bringing a Bill of Review; yet after a long Acquieſcence under a Decree the Court will not reverſe it but upon very apparent Errors.

Upon the Pleadings in the Cauſe, it appear'd that the Lord *Macclesfield*, in *Eaſter Term* 1661, Exhibited his Bill, thereby ſetting forth, that Sir *Edward Fitton* being ſeized in Fee of the Eſtate in queſtion, ſettled this Eſtate upon himſelf for Life, Remainder to all his Sons ſucceſſively in Tail Male, in Caſe he ſhou'd happen to have any, with a Remainder to the Lord *Macclesfield*, who was his Nephew, and the Heirs Male of his Body, but ſubject to a Power of Revocation by Deed or Will. That afterwards Sir *Edward Fitton* made his Will, and thereby devis'd the Lands to the Lord *Macclesfield* in Fee, who therefore pray'd by his Bill to have the Truſt of a Term, that was to attend the Inheritance, aſſign'd to him: and complained that

Fitton

Fitton and the other Defendants pretended to ſet up ſeveral Titles to the Premiſſes.

In Anſwer to this Bill, the now Plaintiff, Mr. *Fitton*, ſet forth, that Subſequent to the Settlement in the Bill, Sir *Edward Fitton* made another Settlement, and thereby limited the Eſtate to himſelf for Life, Remainder to all the Sons he ſhou'd after happen to have in Tail Male, with Remainder to the now Plaintiff and his Heirs, but with a power of Revocation by Deed or Will: and that he did not know, that Sir *Edward Fitton* made any ſuch Will, as was pretended, neither was it material, for that the ſaid Sir *Edward Fition* in his Life-time by Deed Poll, bearing Date the *third* day of *April* 18 *Car*' 1, Releaſed the Power of Revocation in the laſt Settlement.

The Cauſe was heard 13 *Jan*' 1662, and a Tryal directed to be tried at the *King*'s *Bench Bar*, touching the Reality of this Deed Poll, which upon a long and full Evidence was there found to be forg'd; and thereupon they came back into this Court, and the Will being fully prov'd here by Witneſſes, a Decree was made for the Plaintiff the Lord *Macclesfield*, and an Account of Profits directed, and the Deed Poll was ordered to be brought into Court; but a twelve Months time was given to Mr. *Fitton* to try his Title; and in caſe he ſhou'd think fit to try the ſame, an Officer of the Court was directed to attend at ſuch Tryal with the Deed.

Afterwards Mr. *Fitton* within the *twelve* Months brought his Ejectment in the County of *Cheſter*, and upon full Evidence a Verdict paſſed for the Lord *Macclesfield*, who thereupon came back into this Court, and the Decretal Order was made Abſolute.

In the Bill of Review the principal Errors aſſign'd were, *Firſt*, That this was a Title proper at Law, and that a Man ought not to be concluded in a Title which concerns the

the Inheritance, upon a ſingle Verdict, and eſpecially in a feign'd Iſſue, where the whole Title cou'd not come in Evidence.

Secondly, That the Lord *Macclesfield*'s Title was under a Will, and there had never been any Tryal touching the Reality of this Will.

Thirdly, The Plaintiff *Fitton* was ſent to Tryal under a great Prejudice; the Deed Poll being called in the Order a Pretended Deed; by reaſon of which Reflection the Tryal could not be a fair or equal Tryal.

Fourthly, That here was an Account of Profits directed, and a Decree made before any Tryal had, which was prepoſterous.

Fifthly, That here the Deed Poll was damn'd; whereas ſome of the Remainder Men, that claim'd by this Deed, were no Parties to the Suit.

To this Bill of Review the Lord *Macclesfield* pleaded and demurr'd.

The Plea was, that Mr. *Fitton,* (tho' he had taken no Notice of it in his Bill) having by the decretal Order twelve Months time given him to try his Title, he afterwards brought his Ejectment in the County of *Cheſter,* where the whole Title on both ſides came in Iſſue; and that upon a full and long Evidence a Verdict paſs'd for the Lord *Macclesfield,* by a Jury of the beſt Gentlemen in the County.

The Demurrer was, becauſe there was no Error in the Decree; it being grounded upon two Verdicts; and that the Court had a proper Juriſdiction of the Cauſe; there being a long Term out in Truſtees to attend the Inheritance: and that now after 22 Years Acquieſcence under the Decree,

and when all the Witneſſes to the Will were dead, the Plaintiff ought not to be admitted to his Bill of Review; and eſpecially, for that he had not paid the Coſts of the former Suit.

Whether a Fine and Non-claim is not a Bar to a Bill of Review.

For the Plaintiff it was ſaid, that a Bill of Review is not barred by length of time, (*But by ſome at the Bar it was ſaid, that a Fine and Non-claim would have been a Bar to the Bill of Review, if* Fitton *had not been in Priſon*) and that the Title was properly a Title to be tried at Law, and yet had never been tried; for as to the Tryal in the *King's Bench*, that was only in a feigned Action, where the Validity of the Will could not come in Queſtion; and they were alſo ſent to a Tryal under a Prejudice; the Deed Poll being called a Pretended Deed: And as to the other Tryal, there was an Ejectment indeed brought; but there Mr. *Fitton* was under the ſame Prejudice as to the Deed; and he could not make uſe of the Depoſitions of ſome Witneſſes that were dead, the Bill and Anſwer not being brought down: So that in truth the Validity of the Will was never fairly tried; but ſuppoſing there had been one Tryal, and a Verdict upon Evidence againſt Mr. *Fitton*; yet a Title at Law ought not upon that to be perpetually bound up by a Decree of this Court; for that were to make a Verdict in Ejectment as peremptory, as a Recovery in a Writ of Right: but all, that the Court ought to have done in ſuch a Caſe, had been to have ſet the Truſt Term aſide, and have left the Parties to Law: and ſuppoſe a Bill was now brought in this Court, ſuggeſting that a Title was diſputed at Law, and ſhould pray that for Peace ſake a Tryal in Ejectment might be made as peremptory, as a Recovery in a Writ of Right: without doubt a Demurrer wou'd lye to ſuch a Bill.

Secondly, This Decree was unjuſt, to damn the Deed Poll, becauſe that the Remainder Men were not Parties: And tho' Mr. *Fitton* could not fully prove his Title; yet

the Remainder Men might; and by that means the Court might be engaged to make repugnant Decrees.

Thirdly, That here an Account of Profits was decreed before any Recovery at Law, and yet at the ſame time Mr. *Fitton* had a Year's time given him to try his Title, which was prepoſterous: and an Account of Profits was not ſo much as prayed by the Bill; and a Decree ought to be but *ſecundum formam petitionis*: and had the Bill been as general as the Decree, a Demurrer would have lain as to any Relief for an Account.

For the Defendant it was anſwered, That as to what was objected, that the Remainder Men were no Parties, that was no Error to be aſſigned by this Bill; becauſe thoſe, that were not Parties to the Decree, could not be barred by it; neither could they have any Bill of Review of that Decree.

Secondly, As to the Objection, that it was a Title purely at Law: that was a Miſtake; for there being a Truſt of a Term to attend the Inheritance, this Court had undoubtedly a proper Juriſdiction.

Thirdly, That whereas it was objected that the Validity of the Will had never come in Queſtion; that was alſo a Miſtake; for in the Ejectment brought by Mr. *Fitton*, where the Defendant, as well as the Plaintiff, was to make a Title; the Validity of the Will came properly in Queſtion; for the *Lord Macclesfeild* could make no Title, but by the Will; the Prior Settlement with a Remainder to him being with a Power of Revocation, the ſubſequent Settlement to Mr. *Fitton* revoked that; ſo that upon the Ejectment, not only the Validity of the Will but the Reality of the Deed Poll came again in Queſtion: for had either the Deed Poll been found real, or the Will not well proved; in either Caſe the *Lord Macclesfield* could have had no Title: and where the Court has a Juriſdiction by reaſon of a Truſt, it has not been unuſual to make a Deeree upon one Tryal; as in the Caſe of the Lord

Lord *Howard*: and this Caſe is much ſtronger, the Will having been fully proved in this Court, (for ſo the Decretal Order is) and alſo Attempts made to ſet up a forged Deed, and for that Reaſon in Sir *Thomas William's* Caſe, a Decree was made upon one Tryal to damn a forged Deed.

And as to what was objected, that the Decree was larger than the Bill, it was anſwered, the Bill was upon the whole Caſe, and Relief prayed in the Premiſſes: and they alſo inſiſted on the length of time, and that their Witneſſes were dead; as alſo, that the Plaintiff had not paid his Coſts: for tho' the *Lord Keeper* had made an Order to diſpenſe with it, yet that ought to have been ſet forth in the Bill of Review; which in this Caſe was not done.

Order for diſpenſing with Coſts upon bringing a Bill of Review, ought to be ſet out in the Bill.

Per Cur.' When a Decree comes to be reverſed on a Bill of Review, it ought to be either becauſe it was unjuſt in matter of Law ariſing within the Body of the Decree; or for that the Court wanted, or exceeded, its Juriſdiction: neither of which objections were made out in this Caſe; for the Court had a plain Juriſdiction by reaſon of the Truſt of the Leaſe; and without Doubt this Court has a natural Juriſdiction in the Caſe of *Forgery*; this being the proper Court to detect it in, where you may have time to inſpect the Deed, and to ſift the Witneſſes, which the Proceedings at a Tryal at Law do not admit of: and then the Court having a natural Juriſdiction, it is only matter of Diſcretion, whether to ſend it to a Tryal at Law or not; and in Caſe the Deed Poll had been damned without any Tryal, yet it had not been Error. And it being made out that there was a Forgery in the Caſe, the *Lord Keeper* ſaid, he did not wonder the Court inſerted ſome Reflections in the Order in *odium* to the Forgery. And as to what was objected, that the Court ought only to have ſet the Term of Years aſide, and to have left the Parties to Law; which is the only material Objection: He ſaid, He did not think the Court

was

was bound ſo to do. No queſtion but a Bill of Peace to prevent Multiplicity of Tryals is a proper Bill; tho' had the Matter been *Res Integra*, he ſhould not have made altogether ſuch a Decree to have bound the Inheritance, after the Leaſe expired, upon one Tryal; but he obſerved, there was the greater Reaſon for it in this Caſe; becauſe Mr. *Fitton* declined controverting the Will, and reſted upon the Deed Poll for releaſing the Power of Revocation: And tho' there was but one Tryal, wherein the Will could properly come in Queſtion; yet he well remembered, that upon the Tryal of the Forgery in the *King's-Bench*, Doctor *Smallwood* was produced, and he there proved the Will: And tho' there be no Limitation of time to the bringing a Bill of Review; yet after *two* and *twenty* Years he ſhould not reverſe a Decree, but upon very apparent and flat Errors; eſpecially this Decree having been made by the Lord *Clarendon*, who well underſtood the Rules of Juſtice and Equity, (and by Mr. *Keck* no Decree of his was ever yet reverſed) and there having been ſince his time ſeveral other *Keepers* and *Chancellors*, and no Bill of Review brought, he did not ſee Cauſe after this length of Time, when the Witneſſes to the Will were dead, (which whether made or not, is only Matter of Fact) to reverſe this Decree; and therefore diſmiſſed the Bill of Review.

A Decree ought not to be made to bind the Inheritance, where there has been but one Tryal at Law.

Morgan verſus *Dom' Sherrard.*

Caſe 286.

26 Januarij.

A Man poſſeſſed of a Term for Years, makes a Mortgage of this Term to *J. S.* and afterwards acknowledges a Statute to the Lord *Sherrard*, and then confeſſes a Judgment to the Plaintiff *Morgan*.

A Man poſſeſſed of a Term for Years, Mortgages it, and then becomes indebted, firſt by Statute, and afterwards by Judgment, and dies.

The Bill was to have the Equity of Redemption of this Term, which was veſted in the Executor, and ſo become Aſſets, to be adminiſtred in a Courſe of Adminiſtration, and ſubjected to the Judgment; a Judgment in courſe of Adminiſtration at Law being to be preferred to a Statute.

The Judgment ſhall be firſt ſatisfied out of the Equity of Redemption of the Term.

For the Defendant the Lord *Sherrard* it was insisted, that he had the Statute, and that having got the Term extended in the Hands of the Executor, a subsequent Judgment could not avoid that Extent: And his Council alledged, there was a Case in *Anderson* to that Purpose: But the Council on the other Side denyed there was any such Case.

And the *Lord Keeper* was of Opinion, that a Term for Years was not extendable by the Conusee of a Statute in the Hands of an Executor; and tho' it be extendable in the Life-time of the Conusor in his Hands, yet the Extent is but *quousque*, and if the Conusor alien the Term before extent, the Statute binds not the Term; and then if it be not extendable in the Hands of the Executor, it is but a Chattel, like a Jewel or a Horse, and there a Judgment must be preferred in course of Law to a Statute.

The Case of *Fuller* and *Guilmore* was admitted, that a Prior Statute extended shall not be avoided by a subsequent Judgment, but that is in the Case of a Freehold, and not as to Goods or Chattels.

Vid. 2. And. 157. 3 Cr. 734 822. 4 Co. 59. B.

Case 287.

Dolin versus *Coltman.*

3 Februar. *In Court.*

THE Wife joins with her Husband in a Mortgage, and levies a Fine, to the intent to bar her Dower, and in Consideration thereof the Husband agrees the Wife shall have the Redemption of the Mortgage: And the Husband afterwards Mortgages this Estate twice more.

The Wife joins in a Mortgage, and levies a Fine to bar her Dower, and in Consideration thereof, the Husband agrees the Wife shall have the Equity of Redemption in lieu of her Dower, and afterwards he makes a second Mortgage.

The Court took this Agreement to be fraudulent, as against the subsequent Mortgagees, so far as to intitle the Wife to the whole Equity of Redemption: But in regard the Wife, in Confidence of this Agreement, had levied the Fine, and thereby barred her Dower, and the Husband and Wife being both living, the Court decreed that after the Husband's Decease, the Wife, in case she should

This Agreement is fraudulent as against

ſhould happen to ſurvive him, ſhould enjoy her Dower: And whereas the Mortgagees preſſed, that the Decree might only be, that ſhe ſhould enjoy her Dower, notwithſtanding the Fine; the Court thought it unreaſonable in this Caſe to put the Wife to her Writ of Dower; becauſe they might convey away the Eſtate, and ſhe not know againſt whom to bring her Writ of Dower. And therefore decreed the Dower to her.

the ſecond Mortgagee; ſo far as to intitle the Wife to the whole Equity of Redemption; but decreed ſhe ſhould have her Dower, notwithſtanding the Fine.

Booth verſus *Rich.*

Caſe 288.

Eodem die.

In Court.

PER Cur'. There being an Infant in the Caſe, we can't foreclose him without a Day to ſhew Cauſe, after he comes of Age: But the proper way in ſuch a Caſe is, to decree the Lands to be ſold to pay the Debts; and that will bind the Infant.

An Infant can't be foreclo'ed without a Day to ſhew Cauſe. But the proper way is to decree a Sale, and that binds the Infant.

Com' Newburgh verſus *Bickerſtaffe.*

Caſe 289.

4 Februar.

THIS Cauſe came this Day to hearing; and upon the Pleadings it appeared to be a pure Title at Law, and reſted upon this ſingle Point, whether the Marſh Lands in queſtion were Dutchy Lands or not; the Lord *Newburgh* claiming by a Patent under the Dutchy Seal in King *James*'s time, and the Defendant Sir *Charles Bickerſtaffe* claiming under a Patent in King *Charles* the *firſt*'s time, granted unto the Duke of *Richmond* under the Great Seal; ſo that if they were Dutchy Lands, they were well paſſed to the Lord *Newburgh*; but if not Dutchy Lands, but *Derelict* Lands, then they were well paſſed to the Duke of *Richmond*; and as to the Juriſdiction of this Court in the Caſe, it was inſiſted, that the Plaintiff being an Infant, no Latches ſhould prejudice his Right, and therefore the Plaintiff's Bill, tho' he was an Infant, was proper for an Account of Profits in this Court.

An Infant ſhall have an Account of Profits againſt an Intrudor, *&c.* But where there is a Verdict againſt the Infant's Title, he can have no Account till he has recovered at Law.

The

The Lord *Keeper* obſerved, that *Littleton* ſays, if a Man intrudes upon an Infant, he ſhall receive the Profits, but as Guardian; and the Infant ſhall have an account againſt him in this Court, as againſt a Guardian: But to that it was anſwer'd, that in this Caſe a Verdict had paſs'd againſt the Infant; and that binds his Right, as to an account of Profits; and that the Poſſeſſion was recover'd in the Life-time of the Infant's Father; and in ſuch Caſe Latches wou'd run upon an Infant; and beſides the Plaintiff was not proper for an Account here, until he had firſt recover'd at Law.

But the Court retain'd the Bill, and directed there ſhou'd be a Tryal in Ejectment at the *King*'s *Bench* Bar next Term.

Thynn verſus *Thynn.*

Caſe 290.
9 Februar.
In Court Lord Keeper.

A Man makes his Will, and his Wife Executrix: the Son afterwards prevails on his Mother to get the Father to make a new Will, and to name him Executor, he promiſing to be a Truſtee only for his Mother.

Truſt decreed, notwithſtanding the Statute of *Frauds* &c.

THE Caſe was, that Mr. *Thynn* of *Eagham* Deceaſed having made a Will, and thereby made his Wife ſole Executrix; the Defendant Mr. *Thynn* the Son, hearing of this Will, came to his Mother in the Life-time of his Father, and perſwaded her, that there being many Debts, the Executorſhip would be troubleſome to her; and deſired that he might be nam'd Executor; for that he by reaſon of his Privilege of Parliament could ſtruggle the better with the Creditors, and perſwaded his Mother to move his Father in it; declaring, that he would be only an Executor in Truſt for her: And the Mother accordingly prevails on the Father that it might be ſo: and thereupon Mr. *Thynn* the Son gets a new Will drawn, whereby a Legacy of 50 *l.* only is given to his Mother, and therein he makes himſelf ſole Executor; and cancels the former Will, tho' the Father oppoſed the doing thereof; and the laſt Will was read over ſo low, that the Teſtator could not hear it; and when he called to have it read louder, the Scrivenor cried, he was afraid of diſturbing his Worſhip. The Defendant having

having thus made himſelf ſole Executor, and procured this Will to be executed, where only a Legacy of 50 *l.* was given to his Mother, ſet up for himſelf, and denied the Truſt for his Mother: and in his two firſt Anſwers he denied the Will was drawn by his Directions, and that the 50 *l.* therein given to his Mother was without the Teſtator's Privity; but in his third Anſwer he confeſſed it.

Upon the whole Matter, it appearing to be, as well a Fraud, as alſo a Truſt, the Lord *Keeper*, notwithſtanding the Statute of *Frauds* and *Perjuries*, tho' no Truſt was declar'd in Writing, decreed it for the Plaintiff, and Order'd that the Defendant ſhou'd be examined on Interrogatories for diſcovery of the Eſtate.

Strelly verſus *Winſon.*

Caſe 291.
Eodem die.
In Court Lord Keeper.

THERE being *three* Part-owners of a Ship, one of them refuſes to fit out the Ship to Sea, and the others do it without his Conſent, and the Ship is loſt in the Voyage.

Three Part-owners of a Ship. One refuſes to Navigate the Ship; and the other two do it againſt his Conſent, and the Ship is loſt in the Voyage. He, that refuſed to join, ſhall bear his proportion of the Loſs; for he would have been intitled to a ſhare of the Profits, if there had been any.

Per Cur'. In this Caſe the Loſs of the Ship ſhall be equally born by all three; for tho' one of the Partners did not conſent to the fitting out of the Ship, yet he would have been intituled to one third part of the Freight, and in this Court ſhould have had an Account of the third part of the Profits of that Voyage: and ſo where one Tenant in Common receives all the Profits, he ſhall Account in this Court as Bayliff to the other two for two thirds. But in caſe the other two Part-owners had apply'd to the Court of *Admiralty*, as regularly they ought to have done, that Court wou'd have made an Order, that upon one Part-owner's refuſing to Navigate the Ship, the other two ſhould have liberty to do it alone, and ſhou'd not have been Accomptable to the Part-owner, that refuſed to join, for any part of the Profits: and there in caſe the Ship

had been loſt, the whole Loſs muſt have reſted on thoſe two, that ſet out the Ship: but in the preſent Caſe, in regard the third Perſon, who refuſed to join with the other two, would have been intitled to a ſhare of the Profits of the Voyage, if any had been made by the Ship, he ought to bear his Proportion of the Loſs. *Qui ſentit Commodum ſentire debet & onus.*

Caſe 292.
11 Februar.
In Court Lord Keeper.
Suggeſting prior Incumbrances to Perſons living out of a *County Palatine* will intitle this Court to a Juriſdiction concerning Lands within the *County Palatine.*

Hall verſus *Dowthwaite.*

THIS Caſe concerned Lands within the County Palatine of *Durham*; and in order to intitle this Court to Juriſdiction of the Cauſe, the Bill ſuggeſts prior Incumbrances to Parties, that lived out of the Juriſdiction: but when the Cauſe came to hearing, no ſuch matter was made out by proof; but it appearing that the Proceedings in the County Palatine had been unjuſt, the *Lord Keeper* ſaid, he would retain the Cauſe, and conſider of it.

Caſe 293.
Eodem die.
In Court Lord Keeper.
Mony agreed on Marriage to be laid out in Land and ſettled to the uſe of Husband and Wife, and their Iſſue, with Remainder to the Husband in Fee.
The Husband dies leaving a Son, who died without Iſſue.
The Heir of the Husband brings a Bill againſt the Wife, who is Adminiſtratrix of her Husband

Kettleby verſus *Atwood.*

BY Articles made upon Marriage it was agreed, that the Wife having 1500 *l.* Portion the Husband ſhould add 500 *l.* more to it, and that the ſame ſhould be depoſited in Truſtees Hands, until a convenient Purchaſe could be found out for inveſting the ſame in Land; which Land, when purchaſed, was to be ſettled to the uſe of the Husband and Wife for their Lives, Remainder to the firſt and other Sons of their two Bodies in Tail, Remainder to their Daughters in Tail, with a Remainder over to the right Heirs of the Husband. And in the Articles there was a Proviſo, that in Caſe the Husband died without Iſſue, the Wife might make her Election, whether ſhe would have the Land or Mony, and had ſix Months time to make her Election.

The

The Husband died before any Purchaſe was made, leaving the Wife *Enſeint* of a Daughter, born ſoon after his Death, who died at a Month old. The Wife was Adminiſtratix both to her Husband and Child, and made her Election within the *ſix* Months to have the Mony, and gave notice thereof to the Plaintiff, who was her Huſband's Brother and Heir.

and Son to have the Mony laid out and ſettled according to the Articles. Bill diſmiſſed.

The Bill was brought by the Plaintiff to have the 2000 *l.* inveſted in Lands and ſettled according to the Articles.

Lord Keeper. Had a Bill been brought in the Life-time of the Infant (it being better and ſafer for the Infant to have had Land than Mony) I would have decreed the Mony to be laid out for the benefit of the Infant: but I do not ſee, what Equity the Heir has againſt the Adminiſtratrix. The Bill was diſmiſſed, but without Coſts.

Note, this Cauſe was reheard *Mich. Term.* 1687, by the *Lord Chancellor Jefferies*, who decreed for the Heir.

Vid. Poſt Caſe 458.

Dominick verſus *Langley.*

Caſe 294.

Eodem die.

In Court Lord Keeper.

THE Caſe aroſe upon a Marriage Settlement, wherein there was a Proviſo, that in caſe the Husband ſhould have no Iſſue Male of the Marriage, but ſhould leave Iſſue Female, then the Heirs of his Body, or he that ſhould have the Eſtate by vertue of the Limitations in the Settlement, ſhould pay to ſuch Iſſue Female 1000 *l.* at 18 Years of Age or Marriage, which ſhould firſt happen.

The Husband died, leaving Iſſue Male and Iſſue Female by his Wife, and the Iſſue Male died before the Portion to the Iſſue Female became payable. Mr. *Sollicitor*, The Intent of this Settlement is, that in caſe the Husband died, and there ſhould be no Iſſue Male of the Marriage living when the Portion became payable, then the 1000 *l.* were to be paid. *Sed non allocatur per Cur'.* And the Bill was diſmiſt.

HIS Majeſty King Charles *the* Second *being ſeized with a violent Diſtemper, like an Apoplectick Fit, on* Monday *being* Candlemas Day, *about* Seven *of the Clock in the Morning, and Doctor* King *being accidentally there, immediately let him Blood; but his Majeſty continued many Hours in his Fit before he recovered his Senſes, and afterwards lay languiſhing of his Diſtemper with a kind of an intermitting Fever until the* Friday *following, when he died between the Hours of* Eleven *and* Twelve; *all the Courts at* Weſtminſter *meeting and ſitting about an Hour that Day: And about* three *o'Clock in the Afternoon of the ſame Day, King* James *the* Second *was Proclaimed, and the Judges, Attorney and Sollicitor General having new Commiſſions, were ſworn on* Monday *following at the* Lord Keeper's *Houſe, and ſat at* Weſtminſter *the ſame Day: And on* Tueſday *the* Lord Keeper *and the* Maſter *of the* Rolls *ſat in Court, the* Maſter *of the* Rolls *adminiſtring the Oath to the* Lord Keeper.

Caſe 295.

Anonimus.

UPON a Motion for a Serjeant at Arms on a Commiſſion of Rebellion retorned:

Per Cur'. By the King's Demiſe all Proceſs of Contempt not executed is determined, ſo that you muſt begin again at an Attachment; but where any Proceſs is executed, and a *Cepi Corpus* returned, there the Proceſs ſtands good.

Anonimus.

Case 296.

Prohibition lyes not to an Inferior Court, after the Defendant has pleaded there; for by pleading the Defendant submits to the Juriſdiction.

But at the Suit of the King, Prohibition lyes, tho' the Defendant has pleaded.

But if a Prohibition has been granted the Court will deny a *Superſedeas*, unleſs there is an Affidavit that the Cauſe aroſe within the Juriſdiction.

ON a Motion for a *Superſedeas* to a Prohibition to an Inferior Court, for that the Prohibition was pray'd at the Suit of the Party after he had pleaded to Iſſue, and by that ſubmitted to the Juriſdiction of the Inferior Court:

Lord Keeper. That is a good Reaſon why a Prohibition ſhould not go at the Suit of the Party; but where an Inferior Court meddles with Matters out of its Juriſdiction, I will grant a Prohibition for the King in ſuch a Caſe: But if you bring an Affidavit that the Cauſe of Action aroſe within the Juriſdiction, upon that I will award a *Superſedeas*.

Spalding verſus *Shalmer & St. Amond & al'.*

Case 297.

18 Februar.

Where Lands are to be ſold for Payment of particular Debts, the Purchaſor muſt take Care to ſee his Purchaſe Mony rightly applied.

But if more is ſold than is ſufficient to pay the Debts, that ſhall not turn to the Prejudice of a Purchaſor.

THE Caſe was, that *Auguſtine Spalding*, the Plaintiff's Father, did in *April* 1666 convey ſeveral Manors and Lands lying in *Hutton*, *Blagdon*, *Congresbury*, and *King ſton Seymour* in the County of *Somerſet*, to *Alexander Dyer*, *Thomas White* deceaſed, and the Defendant *Shalmer*, and their Heirs, to the Uſe of them and their Heirs until they had rais'd by Sales or Profits ſufficient to pay the Debts in a Schedule to the Deed of Truſt annext, amounting to 1061 *l.* and alſo to pay 1500 *l.* to one *Codrington*, in caſe he ſhould convey an Eſtate in *Hutton* according to Articles made betwixt him and *Spalding* dated 21 *March* 1653; and after Payment of the Debts, and the 1500 *l.* and all Charges relating to the ſaid Truſt, the Truſtees were to ſtand ſeized of the Remainder of the Lands unſold, to the Uſe of the Plaintiff, the Son of the ſaid *Spalding*, in

Tail Male, with Remainder to the right Heirs of the ſaid *Auguſtine Spalding*.

The Truſtees enter and undertake the Truſt, and in 1668 ſell unto *Robert* and *Richard Viccaris* the Lands at *Congresbury* for 1500 *l.* and ſell other Lands at *Hutton* to ſeveral other Perſons for 772 *l.* more, and ſo raiſed by Sales in all 2275 *l.* and after this the Truſtees in 1670 convey the Lands at *Kingſton Seymour* to *Nixon* and *Newcourt*, which is mentioned to be in conſideration of 840 *l.* but no Mony was actually paid, and the Conveyance to *Nixon* and *Newcourt* was only in truſt for *Alexander Dyer:* and as touching the 1500 *l.* to be paid to *Codrington*, he could not make a good Title, and ſo the Purchaſe was broke off; and inſtead of paying the 1500 *l.* to him, there was a Decree made in 1672 that *Codrington* ſhould pay to the Truſtees 800 *l.* being part of the Purchaſe Mony, that *Spalding* had advanced in his Life-time; which 800 *l.* was accordingly paid; ſo that now the Truſtees had received 3275 *l.* Whereas the Schedule Debts amounted but to 1061 *l.* and the Receipts and Payments were all Indorſed on the Deed of Truſt.

After this, *viz.* in 1679, *Dyer* the Truſtee owing 200 *l.* by Bond to the Defendant *St. Amond*, *St. Amond* lends him 200 *l.* more, and thereupon the ſaid *Alexander Dyer*, and *Nixon* and *Newcourt* his Truſtees, make a Mortgage to the Defendant *St. Amond* of the Lands at *Kingſton Seymour* for ſecuring the 400 *l.* and Intereſt, and deliver to him the Deed of Truſt, by which he had Notice, that the Truſt was only for Payment of the Schedule Debts, which amounted but to 1061, and the 1500 *l.* to *Codrington*, and had alſo Notice by the Indorſements, that the Truſtees had raiſed by Sales before the Conveyance to *Nixon* and *Newcourt* 2275 *l.* but it did not thereby appear whether *Codrington*'s 1500 *l.* were to be paid or not.

Upon the hearing this Cauſe, the Queſtions were, how far the Truſtees ſhould be charged with this Breach of Truſt, and whether *St. Amond*'s Mortgage, he coming in with Notice of the Truſt, ſhould ſtand good againſt the Heir.

For the Plaintiff it was inſiſted, that all the Truſtees were anſwerable to the Plaintiff for the Breach of Truſt, in regard the Deed of Truſt was particular, that they ſhould ſell for Payment of the Debts in the Schedule only; and when they had raiſed by the Sale made to *Robert* and *Richard Viccaris* 1500 *l.* that was ſufficient to pay the Debts in the Schedule, with an Overplus; and all the ſubſequent Sales, wherein they all joined, were Breaches of Truſt. But as to that it was anſwered, by the Defendant's Council, that when the Lands at *Hutton* were ſold, and the Lands at *King ſton Seymour* conveyed to *Nixon* and *Newcourt*, the Contract with *Codrington* was not broke off; for the Decree was ſubſequent to thoſe Sales, and it did not then appear but 1500 *l.* was neceſſary to be raiſed for the carrying on that Purchaſe. Whereunto for the Plaintiff it was replied, that *St. Amond*'s Mortgage was ſubſequent to the Decree, and he ought to have enquired whether *Codrington* had convey'd the Lands at *Hutton*; for by the Deed of Truſt, the 1500 *l.* was not to be raiſed till he had conveyed.

Lord Keeper. Each Truſtee ſhall be charged for no more then he actually received; but where they join in Receipts, there they ſhall be all charged. And as to *St. Amond*'s Mortgage, that was held to be good. Where Lands are to be ſold for Payment of particular Debts, the Purchaſor muſt take care to ſee his Mony rightly applied, and if the Debts be not paid, *that* is ſuch a Breach of Truſt as ſhall affect the Purchaſor; but if more be ſold than is ſufficient to pay the Debts, that ſhall not turn to the Prejudice of the Purchaſor; for he is not obliged to enter into the Account; and the Truſtees cannot ſell juſt ſo much as is ſufficient to pay the Debts: And he obſerved the Deed of Truſt

Each Truſtee ſhall be charged for no more than he actually receives. Otherwiſe, if the Truſtees join in Receipts.

Poſt Caſe 473. juxta finem cont'.

Truſt was not only for the Payment of Debts in the Schedule, but alſo to pay the Truſtees their Coſts and Charges.

It was then ſaid for the Plaintiff, that 200 *l.* of the Mony on *St. Amond*'s Mortgage was not advanced upon account of the Truſt, but was a Debt owing by *Dyer*, and therefore ought not to be charged on the Truſt Eſtate. *Sed non allocatur.*

The Court alſo directed, that the Monies disburſed by the Truſtees for the Maintenance of *Auguſt. Spalding*'s Children, tho' not within the Truſt, ſhould be allowed.

Caſe 298.

24 Februar.

Maſſenburgh verſus *Aſh.*

Ante Caſe 230.

THIS Cauſe upon the former Hearing having been directed to be tried in a feigned Iſſue in the *Common Pleas*, that ſo the Validity of the contingent Limitation over of the Truſt of the Term to the Plaintiff might come in Iſſue, *Lord Keeper* declaring that the Truſt of a Term in Equity ought to be governed by the ſame Rule as an Executory Deviſe of a Term at Law: Afterwards upon a Motion it was ordered, that a Caſe ſhould be drawn up for the *Judges* of the *Common-Pleas* to give their Opinion upon: And the *Judges* having unanimouſly given their Opinion, that the contingent Limitation over to the Plaintiff was good, for this Reaſon; becauſe the contingent Limitation was circumſcribed, and muſt happen within the Space of 21 Years: The Cauſe came now to be heard upon the Equity reſerved, and the *Lord Keeper* declared himſelf fully ſatisfied with the Opinion of the *Judges*, and decreed for the Plaintiff; and ſaid, he took this Caſe to be the ſame with the Caſe of *Wood* and *Saunders*, where the Truſt of a Term was limited to the Husband for Life, Remainder to the Wife for Life, with a Remainder to their Eldeſt Son; and if he died leaving Iſſue, then to that Iſſue; but in caſe he ſhould happen to

Truſt of a Term limited to the Husband for Life, Remainder to his firſt Son; and if that Son die

die in the Life-time of the Husband or Wife without Iſſue, then the Remainder over was limited to another Son of the Husband and Wife; and this Remainder by the Advice of the *Judges* was held to be good.

leaving Iſſue, then to ſuch Iſſue; but if the Son die in the Life-time of the Father without Iſſue, then to the 2d Son. This Remainder is good.

Stapleton verſus *Sherrard.*

Caſe 299.

24 Februar.

THE Queſtion in this Caſe was upon the Cuſtom of the Province of *York*, the Husband dying inteſtate without Iſſue in the Life-time of the Wife, whether the Wife ſhould have any Benefit of the other Moiety, as Adminiſtratrix, by vertue of the Statute of *Diſtributions*; and the Caſe of *Criſp* and *Hayes* in the *King's-Bench* was cited, wherein it was ſaid to have been adjudged, that the Legatory part was out of the Cuſtom, and was to be governed by the Statute of *Diſtributions*. But for the Plaintiff it was ſaid, that in the Caſe of *Ramſden* and *Gudgeon* in this Court, it was adjudged otherwiſe; and that by the Cuſtom of the Province of *York*, where the Husband dies without Iſſue, the Childrens Part ought to go over to the next of Kin; but that was denied by the Council for the Defendant, who ſaid the Cuſtom of the Province of *York* was the ſame with the Cuſtom of the City of *London*, unleſs in the Caſe where the eldeſt Son has Lands by Deſcent, he ſhall have no part of the Perſonal Eſtate.

The Cuſtom of the Province of *York* does not extend to the Teſtamentary part of the Perſonal Eſtate, ſo that if an Inhabitant within the Province dies inteſtate, leaving a Wife and no Child, the Wife ſhall have a Moiety by the Cuſtom, and a Moiety of the other Moiety by the Statute of Diſtributions. *Vid. poſt Caſe* 311, 407, 446.

As to the Matter in Queſtion the *Lord Keeper* would deliver no Opinion, but ordered, that the Lord Archbiſhop of *York* ſhould be attended, and deſired to certify how the Cuſtom of the Province of *York* was in that Particular.

Eaſt India Company verſus *Evans & al'.*

Caſe 300.

25 Februar.

THE Bill was brought by the Company, ſetting forth their Letters-Patents, and the great Charges they

Bill by *East India* Company againſt a ſeparate Trader.

were at in making Leagues with Princes, and building Forts, and maintaining Forces in *India*, and prayed a Diſcovery what the Defendants had traded for there, and that they might be compelled to bear a proportionable part of the ſaid Charges.

To which Bill the Defendants pleaded, anſwered, and demurred. They pleaded they were free Merchants, and ſet forth the Statute 21 *Jac.* againſt reſtraining of Trade, and the Statute 9 *Edwardi tertio*, that all Merchants might trade any where, and the Statute 18 *Edw.* 3. that Merchants might trade any where not in Enmity with the King; and averred the *Indians* were not in Enmity: And demurred as to the Diſcovery, becauſe it was to ſubject them to a Penalty; and alſo to that part of the Bill that would inforce them to contribute to the Company's Charge; becauſe it appeared by the Plaintiffs Bill that they denied the Defendants Liberty to trade to *India*, or to have the Advantage of the Plaintiffs Privileges: And by Anſwer the Defendants denied they traded under the Company's Colours, *&c.*

For the Defendants it was inſiſted, that as to what the Plaintiffs prayed a Diſcovery of, it was to enable them to go on in an Action which founded only in *Tort*, and therefore they ought not to have a Diſcovery in Equity; and the Diſcovery would likewiſe ſubject the Defendants to great Penalties; for tho' the Company by their Bill waved the Forfeiture, yet they might diſmiſs their Bill, and would not be bound by that Offer; and beſides, that Offer could in no ſort bind the *King*, who was intitled to one Moiety of the Forfeiture, and had already brought Informations againſt the Defendants.

For the Plaintiffs it was inſiſted, that *Sandyes*, one other of the *Interlopers*, was ordered to admit he had traded to the Value of 1000 *l.* and the Company had already recovered againſt him, by which they had affirmed their Right at

at Law; and therefore ought to have a Diſcovery againſt theſe Defendants: And as to what was objected from the Statute of King *James*, *that* related to home Trade only, and not to foreign Trade; and as to the other Statutes of *Edw.* 3. they would not reach this Caſe; for here was no League of Amity, but only a League of Commerce; and the Defendants have by their Plea ſaid, the *Indians* are not Enemies; but do not ſay they are at Amity. And as to the Objection, that the Actions brought by the Company founded in *Tort* only, it was a common Caſe, that a Man ſhall have a Diſcovery in this Court in order to enable him to bring an Action of *Trover*, and cited the *Printers* Caſe in this Court. And as to the Clauſes of Forfeitures they were void in Law, and it had been oftentimes adjudged that any Reſtriction of Trade under Pain of Forfeiture was abſolutely void. And as to the Informations brought againſt the Defendants, they are not brought for the Forfeitures, but for a Contempt to the *King*, and the Defendants Demurrer is improper, for we hope to have Relief here, by a Commiſſion to examine our Witneſſes who live beyond Sea, and to have our Poſſeſſion quieted.

Serjeant *Pemberton* for the Defendants: There is no Precedent in this Court that a Bill might be brought for a Diſcovery to enable the Plaintiff to bring an Action that founds in *Tort* only; and ſuppoſing the Plaintiffs Patent is a Patent for Regulation of Trade only, yet it is but like a Patent for a new Invention. The Caſe in *Trover* is founded upon a Right; and tho' the Plaintiffs now ſay the Clauſes of Forfeitures in their Patent are void, yet I know that lately in Mr. *Boome*'s Caſe in the *Common-Pleas* they made uſe of thoſe Clauſes in this Patent, to juſtify a Seizure of Goods.

Lord Keeper. Clauſes to reſtrain Trade under Forfeitures have been adjudged void above 20 times; ſo that Matter is out of the Caſe; and it is a Miſtake to ſay a Man ſhall not

Clauſes in a Charter to reſtrain Trade under a Forfeiture, void.

Clauſe in a Charter to regulate Trade, good.

Bill of Diſcovery lies in Equity, tho' for Matters ſounding in *Tort*.

not have a Diſcovery in this Court for Matters that ſound in *Tort*; and cited the Caſe, where a Man carried his Mine under his Neighbour's Ground; and the Caſe, where a Man run away with a Casket of Jewels, he was ordered to anſwer, and the injur'd Party's Oath allow'd as Evidence in *Odium ſpoliatoris*: and it ſeemed to him a ſtrange Demurrer, to ſay they are not to contribute to the Charge of the Company, becauſe they were Wrong-doers. And this was but a Charter for regulating of Trade, and there had been many Patents for that Purpoſe, ſoon after the making of the Statute of 21 *Jac.* which had never been thought illegal, nor complained of in any Subſequent Parliament. And therefore his *Lordſhip* over-ruled the Plea and Demurrer, and ordered the Defendants to anſwer the Bill.

Caſe 301.

25 Februar.

In Caſe of Abatement it is not neceſſary to revive againſt a Defendant, that has not anſwered.

Oxburgh verſus *Fincham.*

DEMURRER to a Bill of Revivor, becauſe the Plaintiff had not reviv'd againſt all the Defendants. *Per Cur'*. It is not neceſſary to revive againſt a Defendant, that has not anſwered.

Caſe 302.

Eodem die.

A Bill to examine Witneſſes in *Perpetuam rei memoriam* is not proper until the Party has eſtabliſhed his Right at Law. *Vid. Poſt Caſe* 308.

If one Commoner brings an Action againſt *A. B.* for oppreſſing the Common, or for uſing the Common where he ought not, and recovers 1*s.* or o-

Pawlett verſus *Ingres.*

ONE Commoner had brought an Action on the Caſe againſt another Commoner, for oppreſſing the Common, and had recovered 10*l.* Damages. The Bill was brought by the Defendant at Law to examine his Witneſſes to prove his Right of Common in *Perpetuam rei memoriam.*

Per Cur'. Such a Bill is not to be admitted in this Court. A Commoner ought not to come here, to prove his Right of Common, until he has recovered at Law in Affirmance of his Right: but if the Bill had been, that one Commoner had recovered 1*s.* or other ſmall

ſmall Sum for Damages againſt the Plaintiff for oppreſſing the Common, or for uſing the Common where he ought not, and therefore that the other Commoner might accept of like Damages for what was paſt, to prevent Charges at Law; *That* had been in the Nature of a Bill of Peace, and had been a proper Bill in this Court.

ther ſmall Sum for Damages, and afterwards another Commoner brings the like Action againſt *A. B.* he may bring a Bill in Equity, that the Plaintiff in ſuch Action may accept the like Damages.

Norton verſus *Sprig.*

Caſe 303.
27 Februar.

How far the ſecond Huſband is liable to a *Devaſtavit* or Breach of Truſt of the Wife and her firſt Husband.

UPON arguing Exceptions to the Maſters Report the Queſtion was, how far the ſecond Husband ſhould be charged of his own Eſtate, for a *Devaſtavit* and Breach of Truſt, committed by the Feme, and her firſt Husband.

Per Cur'. Where there is a Bond there is a *Lien* by Deed, and ſo the ſecond Husband bound; but where there is barely a Breach of Truſt or Debt by Simple Contract, there in Equity the Plaintiff ought to follow the Eſtate of the Wife, in the Hands of the Executor of the firſt Husband.

Grice verſus *Banke.*

Caſe 304.
Eodem die.

THE Court of Judicature for rebuilding Houſes burnt down by the great Fire in *London*, having ſettled the Rent, which the Tenant was to pay for the Houſe in Queſtion, *viz.* 5 *l. per Ann.* and there being an ancient Rent of 1 *l.* 5 *s. per Ann.* iſſuing out of the ſame Houſe to a Charitable Uſe, and which was now 20 Years in Arrear, the Queſtion was whether the Landlord or Tenant ſhould pay this Rent.

Upon reading the Act of Parliament, the *Lord Keeper* was ſatisfied the Tenant was in no Caſe to be charged with more than the Rent of 5 *l. per Ann.* in the whole; and directed

the Plaintiff to bring the Lady *Dorſet*, who had the Reverſion expectant on the Leaſe, before the Court; and ordered the Tenant not to pay any more of his Rent in the mean time, and declared that the growing Payments and the Arrears of the 1 *l.* 5 *s.* a Year ought to be deducted out of the Rent.

Caſe 305.

28 Februar.

Pritman verſus *Pritman.*

A Decree of Diſmiſſion may be pleaded in Bar to a new Bill, tho' it is not Signed and Enrolled.

A Former Decree of Diſmiſſion being pleaded in Bar, it was objected, that the Diſmiſſion and Decree could not be pleaded in Bar, becauſe the Decree was not Signed and Enrolled; and if the Defendant would have it that it was a Suit ſtill in being, then the Plea was a Plea in Abatement only.

Per Cur'. Either that Suit was for the ſame Matter as the preſent, or not; if not, you ought to have moved to have had the Plea referred; but if it is, then that Suit is either depending or determined, and either way is pleadable.

Caſe 306.

Eodem die.

Nicholſon verſus *Pattiſon.*

Demurrer for not making Oath of the Loſs of a Deed whereof a Diſcovery is ſought by the Bill.

THE Bill ſuggeſted the Defendant had got into his Cuſtody a Writing purporting an Agreement betwixt the Plaintiff and Defendant, and prayed he might ſet it forth; and ſuggeſted further that the Plaintiff had paid the Defendant the Money due, and yet he threatned to take out Execution.

As to the firſt part of the Bill the Defendant demurred; becauſe the Plaintiff had not made Oath of the Loſs of the Writing; and by his Council it was inſiſted, that the Plaintiff himſelf had this Writing, but had razed it ſince the executing of it, and ſo by his own Act has deſtroyed his

his own Remedy at Law, and therefore ought not to be aided in Equity. *Sed non allocatur per Cur'.*

Naylor verſus *Corniſh & al' Civit. Lond.*

Caſe 307.

Eodem die.

While the Judgment againſt the Charter of *London* was in Force, a Bill brought for a Debt due from the Chamber of *London* againſt the old Lord Mayor and Aldermen and the Commiſſioners.

THE Bill was to be relieved touching a Debt due from the Chamber of *London*, under the common Seal of the City, and was brought againſt the old Mayor and Aldermen, and the now Commiſſioners; and the Bill charges, that tho' the King had obtained Judgment againſt the City in a *Quo Warranto*, yet he had been graciouſly pleaſed to declare, that he would take no Advantage of the Forfeiture of their Lands; but had granted the Lands to the Defendants as Commiſſioners to receive the Profits in truſt to pay the City Debts, and that there was a Chamberlain appointed (named in the Bill) and the Plaintiff had likewiſe made Mr. *Attorney General* a Party, charging that he did not oppoſe the Payment of the Plaintiff's Debt.

The Defendants demurred, for that they were not liable in their private Capacities, nor did they receive any of the Rents or Profits of the City Lands as Citizens of *London*, nor upon Truſt to pay the Debts of the City.

For the Defendants it was inſiſted, they acted by Commiſſion, and were only in nature of Managers, and accountable to the King only, and acted only during his Pleaſure.

The *Lord Keeper* ordered the Defendants to anſwer, but ſaid the Plaintiff had but a melancholy Reckoning, there being a Debt of above 150000 *l.* due to the Orphans, which was to be preferred in Payment.

Caſe 308.

Eodem die.

Gell verſus *Hayward.*

Upon a Bill to perpetuate the Teſtimony of Witneſſes touching a Right to a Way, the Plaintiff muſt ſet out the Way exactly in his Bill *per & trans*, as he ought to do in a Declaration at Law.

BILL to examine Witneſſes to perpetuate the Teſtimony of Witneſſes touching a Right to a Way. The Defendant demurred; becauſe the Plaintiffs had not ſet forth by their Bill the Way they claimed with ſufficient Certainty.

Lord Keeper. If you have not laid the Way in your Bill exactly *per & trans*, as you ought to do in a Declaration at Law, I will allow the Demurrer, for Uncertainty. But upon reading the Bill it appeared to be laid certain enough.

But ſuch a Bill ought not to be brought for ſuch trivial things as Right of Common, or for Ways or Water-courſes; or at leaſt not till after a Recovery at Law. *Vid. ante Caſe* 302.

Then the *Lord Keeper* ſaid, he would not allow Examination in *perpetuam rei memoriam* for ſuch trivial things as Right of Common, or for Ways, or Water-courſes; or at leaſt not till after a Recovery at Law; for that the Examination coſts more than the Value of the thing: And in the preſent Caſe, the Plaintiff is either diſturbed in his Way, or he is not; and if he be, he has his Remedy at Law; and if he be not, he has no Reaſon to complain: But for the Plaintiff it was ſaid, that the Bill charged the Plaintiff's Tenant was in Combination with the Defendant, and would not ſuffer the Plaintiff to bring an Action in his Name.

Caſe 309.

Eodem die.

Norris verſus *Bacon.*

Sollicitor brings a Bill for his Fees. Plea of Stat. 3 *Jac.* that the Plaintiff had not Signed his Bill. Good Plea.

A Sollicitor brought a Bill in this Court for his Fees. The Defendant pleaded the Statute 3 *Jac. ch.* 6. that the Plaintiff had not Signed his Bill, and the Plea was allowed.

DE

DE

Termino Paſchæ,

1 *Jacobi II.* 1685.

In Curia Cancellariæ.

Grant verſus *Stone.*

Caſe 310.

IT was moved on behalf of the Plaintiff, that he having enter'd into a Recognizance by Order of the Court, that the Defendant endeavoured to arreſt him upon it at Law; whereas by the Courſe of the Court, he ought to bring a *Scire fac.* only.

An Action at Law will lie upon a Recognizance; but if it is entered into in Purſuance of an Order of this Court, the Court will not allow it to be ſued otherwiſe than by a *Scire fac.* in this Court.

For the Defendant it was ſaid, that a Recognizance is ſuable, as well at Law, as in this Court; and the Defendant had choſe to bring an Action upon the Recognizance, to the Intent he might hold the Plaintiff to Bail.

Lord Keeper. A Recognizance is ſuable in the Courts at Law, either by an Action to be brought on it, or more properly by an Original in the *Common Pleas*; but this being a Recognizance enter'd into by Order of this Court, I will not allow it to be ſued otherwiſe than by a *Scire fac.* in this Court.

Caſe 311.
7 Maij

Stapleton verſus *Sherrard.*

Ante Caſe 299. *Poſt Caſe* 407. 446.

THIS Cauſe came before the Court, upon Exceptions taken to the Certificate of the Lord Archbiſhop of *York*, to whom, upon the hearing of the Cauſe, the *Lord Keeper* had referr'd it, to certifie how the Perſonal Eſtate of an Inhabitant of the Province of *York*, who dies without Iſſue inteſtate, leaving a Widow, ought by the Cuſtom of the Province of *York* to be diſtributed. The Certificate was, that after Debts and Funerals paid, one Moiety of the Perſonal Eſtate belonged to the Widow, and that the other Moiety had been uſually diſtributed amongſt the next of Kin.

Ante Caſe 195.

For the Defendant, the Widow of the Inteſtate, it was argued, that the Cuſtom of the Province of *York*, where a Man dies without Iſſue inteſtate leaving a Widow, extends only to one Moiety of the Perſonal Eſtate, which the Wife is to take by the Cuſtom; and the other Moiety is clearly out of the Cuſtom, and left to go in a Courſe of Adminiſtration, and is to be govern'd by the Statute for the Diſtribution of Inteſtates Eſtates; and the Widow the Adminiſtratrix will be intitled to have her Share of the other Moiety, according to the Statute: And it is unreaſonable to believe, that there is any ſuch Cuſtom as is pretended, for the Cuſtom does *privare Communem Legem.* As to ſo much of the Perſonal Eſtate as the Cuſtom reaches, *That* is bound by it, and no Deviſe of the Party can prevent it. And if the Cuſtom is, as it is here certified, it will follow, that where a Man has Children, there he may by Will diſpoſe of one third Part of his Perſonal Eſtate, but when has none, he can't deviſe one Penny; for by the Cuſtom one Moiety is to go to the Wife, and the other Moiety to the next of Kin: ſo that the whole is bound: and if this be ſo, the Cuſtom has a greater Reſpect to remote Relations, than it has to a Man's own Children; for

for the Children can claim but a third Part by the Cuſtom, but the next of Kin ſhall have a Moiety.

For the Plaintiff it was ſaid, That an Inhabitant of the Province of *York* may diſpoſe of his Eſtate as he will, in his Life-time; and that this Cuſtom is only, where a Man dies inteſtate; and therefore it cannot be ſaid to be unreaſonable, that when a Man is ſurprized, and has not time to make a Will, that one Moiety of his Eſtate ſhould be diſtributed amongſt the next of Kin; and cited *Criſpe*'s Caſe in *B. R.* that where a Citizen of *London* dies Inteſtate, his whole Eſtate, as well the Legatary Part as the Reſidue, is governed by the Cuſtom, and that no Part of it is touched by the Statute of Diſtributions of Inteſtates Eſtates.

Lord Keeper. I take it that the whole is govern'd by the Cuſtom; and the Uſage of the Spiritual Court, (which is here certified by the Archbiſhop) is great Evidence of ſuch a Cuſtom; and I do not believe that the Act for Diſtribution of Inteſtates Eſtates, intended that the Wife ſhould have more than a Moiety: and he ſaid he took it, that the Statute of *H.* 8. leaves the Ordinary at Liberty, to grant Adminiſtration either to the Wife, or next of Kin: But it was ſaid by Mr. *Sollicitor*, that the Courts at Law would prohibit the Spiritual Court from granting Adminiſtration to the next of Kin, where there was a Wife; and cited the Caſes of *Thompſon* and *Butler*, and * Sir *George Sands*'s Caſe in *B. R.* where Prohibitions were granted in ſuch Caſes: But the *Lord Keeper* was of Opinion, that if ſuch Prohibitions had been granted, it was againſt the Act of Parliament, which expreſsly leaves it to the Ordinary's Diſcretion to grant Adminiſtration either to the Wife or the next of Kin.

* 1 Sid. 179.

Boni-

Caſe 312.
8 Maij.

Bonithon verſus *Hockmore.*

Mortgagee or Truſtee manages the Eſtate himſelf, he is not to be allowed for his own Care and Pains. Otherwiſe if he employs a Bayliff.

IN an Account before the Maſter, the Plaintiff, who had married the Defendant's Mother, and had a Debt upon the Eſtate, was allowed by the Maſter great annual Sums of Mony for his Care and Pains in managing of the Eſtate.

Per Cur'. Where a Mortgagee or Truſtee manage the Eſtate themſelves, there is no Allowance to be made them for their Care and Pains; but if they employ a skilful Bayliff, and give him 20 *l. per Ann.* that muſt be allowed, for a Man is not bound to be his own Bayliff.

Caſe 313.
Eodem die.
In Court Lord Keeper.

Barker verſus *Holder.*

Leſſee for a long Term of Years covenants to lay out 200 *l.* upon the Premiſes within the firſt 10 Years; he fails to do it; and after 30 Years were expired, Leſſor brings Action of Covenant, and recovers 150 *l.* Damages. Equity will not relieve.

THE Plaintiff being a Leſſee at 40 *l.* a Year, Covenants to lay out and expend on the Premiſſes 200 *l.* within 10 Years; he fails to do it; and when 30 Years of the Leaſe are expired, the Defendant brings an Action on the Covenant; and about 30 *l.* being proved to have been laid out, recovers 150 *l.* Damages.

The Bill was to be relieved againſt this Verdict, in regard the Damages were exceſſive, or at leaſt that the 150 *l.* might be decreed to be laid out on the Houſes; for the Plaintiff ought to have the Benefit of it during his Leaſe.

Lord Keeper. I think that the Jury dealt very hard with Mr. *Barker*, to give ſuch great Damages, and to put him upon making a preciſe Proof, that the whole 200 *l.* was laid out, when it ought rather to have been preſumed, it was; the Defendant having brought no Action in 20 Years time after the Mony ought to have been laid out; but

but the Jury having thought fit to give ſuch Damages, there is no ground for me to mitigate them, nor to decree the Monies to be laid out on the Premiſſes; for if it had been laid out when there was thrity or forty Years to come in the Leaſe, the Leſſee would have taken Care to have laid it out in laſting Improvements, which it may be, now his Leaſe is near out, he would not do; and therefore diſmiſſed the Bill.

Tunſtal verſus *Oxenbridge.*

Caſe 314.
9 Maij.

THE Plaintiff by his Bill demanded an Account of the Perſonal Eſtate of Sir *John Tunſtall* his Grandfather, and of the Perſonal Eſtate of his Grandmother, who both died inteſtate, and ſeveral Adminiſtrations had been granted of their Eſtates; and now *Oxenbridge*, the Plaintiff's Uncle, had obtained an Adminiſtration *de bonis non*; but all theſe Adminiſtrations, as the Plaintiff by his Bill alledged, were a Truſt for the Children of the Plaintiff's Father's eldeſt Brother, who had aſſigned their Intereſt to him; and the Plaintiff thereupon had now procured an Adminiſtration *de bonis non* to himſelf; and the Plaintiff by his Bill ſought alſo to be let into a Tenant Right of a Church Leaſe, that was enjoyed by his Grandfather, but had been twice renewed by the Defendant: And whereas the Plaintiff's Council would have it that this Leaſe was a Leaſe for Years determinable on three Lives, and ſo went in a Courſe of Adminiſtration, it was anſwered, that it was an abſolute Leaſe for three Lives, and not for Years determinable on three Lives, as they would fancy, for being held of the Dean and Chapter of *Weſtminſter*, they had Power only to demiſe for three Lives or 21 Years, and could not make a Leaſe for 99 Years determinable on three Lives, and ſo Plaintiff's Adminiſtration gave him no Title to a Tenant Right, if any there was; and then for the Plaintiff it was inſiſted, that he had an Aſſignment of the Intereſt of the Heir at Law.

Lord Keeper. If you would be relieved in that reſpect, you ought to have ſet forth the Aſſignment, and grounded your Bill upon it, which you have not done; ſo that your Bill is defective in that Point: And beſides, the laſt Life died ſo long ſince as in 1649, and the Defendant hath renewed the Leaſe twice ſince that time. *Adjournatur.*

Durbaine verſus *Knight.*

Caſe 315.

Eodem die.

In Court.

Feme ſole brings a Bill, and pending the Suit marries, and Baron and Feme bring Bill of Revivor, and obtain a Decree with Coſts; they ſhall have Coſts for the whole Suit, excepting only the Bill of Revivor.

A Feme ſole exhibits her Bill, and pending the Suit Intermarries: The Baron and Feme bring a Bill of Revivor, and obtain a Decree with Coſts.

The Queſtion was whether they ſhould have Coſts of the whole Suit, or only from the Bill of Revivor.

Lord Keeper. This is not like a Revivor againſt an Heir or Executor, where the Suit is abated by Death; in that Caſe they ſhall anſwer only for their own time: But here all Proceedings ſtand in *Statu quo*, and it is unreaſonable there ſhould be ſuch an Abatement. And in caſe the Defendant had been a Feme ſole, and intermarried, *that* ſhould not have abated the Plaintiff's Suit; and in this Caſe the Abatement was by the Party's own Act.

The Court ordered the Coſts of the whole Suit, deducting only the Charge of the Bill of Revivor; which was thought hard in theſe two Reſpects; *firſt*, that the Abatement was by the Party's own Act; *ſecondly*, that had the Defendant been in the right, and ſo ought to have had Coſts, yet he could not have compelled the Plaintiffs to revive.

Anonimus.

Caſe 316.

Whether a *Subpœna* ſerved and a Bill filed is a *Lis pendens* againſt all Perſons.

THAT a *Subpœna* ſerved, and Bill filed, is a *Lis pendens* againſt all Perſons; but the Service of a *Subpœna*,

pœna, without a Bill's being actually filed, makes no *Lis pendens*; but the Bill being filed, the *Lis pendens* comes from the Service of the *Subpœna*, tho' it be not returnable till the next Term, and tho' the Party lives never so remote; for otherwise a Man upon the Service of a *Subpœna* might alien his Lands, and prevent the Justice of this Court: but that being by the Council observed to be a hard Fiction in Equity to bind Purchasors; it was proposed that some Course might be taken, by having some publick Record or Calender kept, whereunto Purchasors might have Resort, and see what Lands are in demand in this Court, as they may at Law in Case of *Fines*. *Cur' advisare vult*.

Agreed it is not, if there is only a *Subpœna* served, and no Bill filed.

Dunch versus *Kent*.

Case 317.

11 Maij.

Ante Case 253.

THIS Cause coming now before the Court, upon the Master's special Report, who had reported, that the Assignments made by *Lindsey* to the Defendants, purported to be in Consideration of Debts due and owing by *Colvile*, yet in Truth they were not *Colvile*'s Debts, but *Lindsey*'s Debts:

Per Cur'. Tho' the Creditors of *Colvile* did not come in within the Year, yet this Patent was a Trust for them, and was special Assetts, and not convertible to other Purposes by *Lindsey*, who married his Executrix; but *Lindsey*, after the Year, ought to have preferr'd his Bill, to have compelled the Creditors to have come in, or otherwise to renounce the Trust; and *Lindsey* having not so done, but assigned to Creditors of his own, that were not Creditors of *Colvile*; *That* was a Breach of Trust, and void, as against *Colvile*'s Creditors. And tho' it was objected, that *Lindsey*'s Creditors had made over their Assignments to other Persons, who came in as Purchasors without Notice, for full and valuable Considerations; Yet, *Per Cur'*, Such Purchasors came in under the Letters Patent, in which the

Truſt is mentioned, and they ought to have taken Notice of it at their Peril.

Zouch verſus *Swaine.*

Caſe 318. *Eodem die.*

A draws in *B*, a Young Gentleman, to ſell his Eſtate at a great Undervalue, with Covenants from *B* for *A*'s quiet Enjoyment. *A* is evicted, and brings Action on the Covenants. *B* relieved in Equity upon Payment only of the Purchaſe-Mony and Intereſt, and not left liable at Law to anſwer the Value of the Land upon the Covenant.

THE Defendant had drawn in the Plaintiff, a Young Man, and purchaſed an Eſtate of him at a great Undervalue; and it happened, that the Title was defective, and the Defendant had been evicted; and there being Covenants for quiet Enjoyment, and other Securities entred into by the Plaintiff, he now came to be relieved againſt an Action brought on theſe Covenants: And for the Defendant *Swaine* it was inſiſted, that he ought to have the Value of the Eſtate evicted. *Lord Keeper*, The Defendant, who was a Lawyer, and ought to have underſtood a Title, purchaſed this Eſtate at a great Undervalue; and the Title now proving defective, and the Land evicted, it is unreaſonable he ſhould make an Advantage of this catching Bargain; and therefore decreed him his Purchaſe-Mony with Intereſt only, diſcounting Meſne Profits.

Seymour verſus *Fotherly.*

Caſe 319. *In Court Lord Keeper.*

One has two Sons, and on the Marriage of his eldeſt Articles to ſettle Land on the Eldeſt Son and his Wife for their Lives, with Remainder to the firſt &c. Son in Tail Male ſucceſſively, Remainder in Fee to the Son. Father brings a Bill to be relieved againſt the Articles, as gain'd by Surprize, and that

THE Father, on the Marriage of his Son with the Plaintiff's Daughter, in Conſideration of 4000 *l.* Portion, which the Father was to receive, Articles to ſettle Lands to the Uſe of the Son for Life, Remainder to the Wife for a Jointure, Remainder to the firſt and other Sons of the Marriage in Tail Male, Remainder to the right Heirs of the Son.

The Bill was to diſcover the Value of the Eſtate, and what Incumbrances might be upon it, and to have the Articles performed. The Defendant having another Son, inſiſted, he was ſurprized in the Articles, and intended that in Default of Iſſue Male of his eldeſt Son, his Eſtate ſhould

ſhould have come to the Second Son, charged with Portions for Daughters, and would have had the Court Interpoſed, that the Settlement might have been ſo made. *Sed non allocatur.*

it was intended to limit the Remainder to the ſecond Son, on Failure of Iſſue of the firſt. *Sed non allocatur.*

Lady Pawlett verſus *Lord Pawlett & al'.*

Caſe 320.
13 Maij.
Ante Caſe 201.

JOHN Lord *Pawlett*, by Indentures of Leaſe and Releaſe 7 & 8 *Maij* 1679, conveys ſeveral Manors and Lands to Truſtees and their Heirs, to the Uſe of himſelf for Life, without Impeachment of Waſte, and after his Death to other Truſtees for the Term of 500 Years, upon the Truſts therein after declared, and then limits ſeveral Remainders over. The Truſt of the Term for 500 Years was declared to be for raiſing Monies by Rents and Profits, or by Leaſes, to be derived out of the Term for 500 Years, in the firſt Place to pay the Lord *Pawlett*'s Debts, as alſo ſuch yearly Maintenance for every younger Son and Daughter as was therein after expreſſed; and after Payment of his Debts, and ſuch Maintenance as aforeſaid, then to pay all ſuch Sums for all and every younger Son and Daughter, as the ſaid Lord *Pawlett* had or ſhould have, and at ſuch Time and Times and in ſuch Manner, as he ſhould by Writing or by his laſt Will appoint; and in Default of ſuch Appointment, the Truſtees ſhould in convenient Time after ſuch Debts as aforeſaid ſhould be ſatisfied, and not before, raiſe and levy out of the Premiſſes 4000 *l.* a-peice for each and every younger Son, and 4000 *l.* a-peice for each and every Daughter of the ſaid Lord *Pawlett* on the Lady *Suſanna* his ſecond Wife begotten, payable at *One and twenty* or Marriage, which ſhould firſt happen; with this further, That in caſe the ſaid Lord *Pawlett* ſhould not otherwiſe direct by Will, every younger Son and Daughter ſhould be allowed ſuch competent Yearly Maintenance and Education, as ſhould be thought requiſite, till the Portions

ſhould be reſpectively paid, ſo as ſuch Maintenance did not exceed 150 *l. per Ann.* for a Son, and 100 *l. per Ann.* for a Daughter; and after the Performance of theſe Truſts, (and ſome other Truſts therein mentioned) the Truſtees were to ſurrender ſo much of the *five hundred* Years Term as ſhould remain, to whom the immediate Reverſion ſhould belong.

The Lord *Pawlett* by his Will the 29 *May* (79) deviſes to his two Daughters by the ſaid *Suſanna* his Wife 4000 *l.* a-piece for their reſpective Portions, to be raiſed and paid to them reſpectively in ſuch Manner, as in the ſaid Indenture is directed; and further Wills that they ſhould have the ſame Yearly Maintenance, until their reſpective Portions ſhould be raiſed, as by the ſaid Indenture was appointed. Provided that by Vertue of his Will, or of the ſaid Indenture or otherwiſe, all put together, his Daughters ſhould not have more than 4000 *l.* a-piece for their Portions; unleſs his Son and Heir apparent ſhould happen to die without Iſſue, and then they ſhould have 2000 *l.* a-piece more.

The Lord *Pawlett* dies, leaving Iſſue by the Lady *Suſanna* one Son, *viz.* the Defendant the Lord *Pawlett*, and two Daughters, *Suſanna* and *Vere*. Before any Part of the Portion of *Vere* could be raiſed, ſhe (12 *December* 1681) dies under Age, and unmarried; and Adminiſtration of her Eſtate is granted to the Plaintiff her Mother, who brings her Bill againſt the Heir and the Truſtees, to have the ſaid Legacy of 4000 *l.* and Intereſt for the ſame from the Death of *Vere*, raiſed out of the Truſt-Eſtate.

This Matter coming on this Day to be argued upon a Caſe ſtated ſpecially by a Maſter, the ſole Queſtion was, Whether, as this Caſe is, the Lady *Suſanna* is entituled to have the 4000 *l.* and Intereſt raiſed out of the ſaid Eſtate.

For

For the Plaintiff it was inſiſted, *firſt*, that the 4000 *l.* was *debitum in preſenti*, but payable *in futuro*, and therefore being an Intereſt veſted, it ought to go to the Adminiſtratrix.

Secondly, that this 4000 *l.* is a Duty ariſing by the Will, and is in the nature of a Legacy; for the Deed was to take place only, in caſe the Lord *Pawlett* had made no Appointment by his Will; and in all Caſes of Conſtruction, Equity ought to favour the Right that goes in a courſe of Adminiſtration: And tho' now the Caſe falls out to be between the Mother and the Heir at Law; which of them ſhall have the benefit of this 4000 *l.* and the Plaintiff's Council would draw an Equity from thence in favour of the Heir; whereas it might have ſo happened, that the Son might have died in the Life-time of his Siſter, and then the Controverſy would have been between the Mother and the half Siſter; and there ought to be the ſame Rule in both Caſes: And ſuppoſe this Portion had been made payable at 21 only, and the Daughter had married and died under 21, leaving Children, it would be hard by a Conſtruction in Equity to deprive the Daughter's Children of this 4000 *l.* and it was urged that the Deed being penned, that after all Portions paid, the Lord *Pawlett* ſhould have the Eſtate, it was not thereby meant that he ſhould have it before all the Portions were raiſed and paid.

For the Defendant it was inſiſted, that the Caſe depends upon the Deed, and not upon the Will, which only confirms the Deed, and is a Caſe purely in Conſtruction, and a Matter of Truſt, and therefore Equity ought to favour the Heir in ſuch a Caſe; and the Caſe of *Bond* and *Brown* was cited as a Caſe in point, which was decreed laſt Term by the *Lord Keeper* in Favour of the Heir; and what was principally relied upon was, that this was not a Legacy, nor did ariſe by the Will; for then it was admitted it muſt have gone in a courſe of Adminiſtration; but the Duty aroſe upon the Deed, and was given under the notion of a Portion, and not as a Legacy, and a Maintenance

nance is appointed in the mean time; and it was not intended that the Daughter ſhould diſpoſe of have any Intereſt in the 4000 *l.* till Marriage, or 21.

Lord Keeper. This is a Caſe both great in Value and in its Conſequence, and I find no Precedent on either ſide; the Caſe of *Bond* and *Brown* being a new Caſe, and decreed but laſt Term, is not to be urged as a Precedent. As to a Legacy deviſed by a Will, I take the Law to be ſettled, that where it is *Debitum in preſenti*, tho' not payable till a future Day, it ſhall go in a courſe of Adminiſtration; and the Reaſon is, that it takes place on the Perſonal Eſtate, and depends purely on a Will, which is to be conſtrued and expounded in the Spiritual Court; and in ſuch caſe it is but juſt that the Legacy ſhould go in a courſe of Adminiſtration, in regard it comes out of the Perſonal Eſtate; and it is indifferent, whether the Executor of the firſt or the laſt takes it: And ſo it is where a Sum of Mony is by Will only deviſed payable out of Land; becauſe it has been looked on as a Legacy; But where it ſtands upon a Deed only, as I take it, it does in this Caſe, the Will being only a Confirmation of the Deed (and ſo it would have been if the Lord *Pawlett* by Deed had only raiſed a Truſt for Payment of ſuch Portions as he by Will ſhould appoint) the Caſe is quite of another Conſideration: And here the Plaintiff has no Title at Law, neither is there any Demand according to the Letter of the Deed; but the Plaintiff would have the Truſtees decreed to raiſe a Portion, which according to the Letter of the Deed never became payable, and wou'd have me force a Conſtruction in Favour of the Plaintiff the Lady *Pawlett*, in Prejudice to the Heir at Law; But I ſee no Reaſon to Decree for the Plaintiff; and the rather, for that the 4000 *l.* is to come wholly out of the Lands, and the Perſonal Eſtate no way ſubjected or made liable to the Payment of it by the Will: And therefore the Bill muſt be diſmiſſed.

Note, this Decree was affirmed upon an Appeal to the Houſe of *Lords*.

Preſton

Preſton verſus *Jervis.*

Caſe 321.
19 Maij.
Lord Keeper.

THE Caſe was, that the Defendant's elder Brother in 1665 ſold Lands, of the Nature of *Borough Engliſh*, to the Plaintiff's Mother, which belonged to the Defendant; the elder Brother apprehending then, as is pretended, that the Defendant was dead. The Plaintiff's Mother took a Bond from the elder Brother, to indemnify her againſt the Defendant's Title; for the Lands lying in *Kent* are preſumed *prima facie* to be *Gavel Kind:* And in truth, as it appeared, and was proved in the Cauſe, the younger Brother having Notice that his elder Brother had thus ſold his Lands, they came to an Agreement, by which the elder Brother was to pay the Defendant an Annuity, which was equal to the Annual Value of the Lands, and ſo he ſuffered the Plaintiff's Mother to enjoy her Purchaſe whilſt the elder Brother lived, but he being dead, the Defendant brought an Ejectment to evict the Plaintiff, who claimed as Heir to his Mother, and thereupon brought his Bill to be relieved.

Lands lying in *Kent* are *prima facie* preſumed to be *Gavel Kind.*

And in regard the Land was ſold in 1665, and the younger Brother in 1674 came over into *England*, and, after he had Notice of the Sale, had accepted an Annuity of his elder Brother, and ſuffered the Plaintiff's Mother to enjoy, without calling her Title in queſtion during all the Life-time of his elder Brother; (whereas if he had ſo done, the Plaintiff's Mother might have taken Advantage of her Collateral Security, which was now of no Value, the elder Brother having left no Aſſetts;) and it being alſo proved that the elder Brother ſuffered ſome other Lands to deſcend upon, and come to the Defendant, which he might have prevented, it was decreed that the Defendant ſhould make good the Plaintiff's Title, and ſurrender and releaſe the Lands to the Plaintiff and his Heirs.

Caſe 322.

Kenge verſus *Delavall.*

20 Maij.

Lord Keeper.

A Woman living from her Husband, and having a ſeparate Maintenance, contracts Debts; the Creditors by a Bill in this Court may follow the ſeparate Maintenance whilſt it continues; but when that is determined, and the Husband dead, they can't by a Bill charge the Jointure with thoſe Debts.

SIR *Ralph Delavall* and his Lady, by reaſon of ſome Diſcontents in the Family, agree to live a-part, and there was a ſeparate Maintenance ſettled on the Lady, but determinable on either of their Deaths. The Lady contracts ſeveral Debts to the Plaintiff and others during the Separation. Sir *Ralph* dies, and the Bill is to ſubject the Defendant's Jointure to the Payment of the Plaintiff's Debt.

Lord Keeper. Had the ſeparate Maintenance continued, there might be ſome Reaſon for the Creditors to follow that, and make it liable to their Satisfaction; but that being determined by the Death of the Husband, I don't ſee which way the Jointure can be charged with it; and the rather for that the Executor of the Husband, who may have paid the Debt, is no Party to the Suit. I overruled the Demurrer indeed, becauſe I would have the Caſe before me with all its Circumſtances, but now I ſee no Equity, and therefore the Bill muſt be diſmiſſed.

Caſe 323.

Whitmore verſus *Weld.*

26 Maij.

In Court Lord Keeper.

2 Vent. 367: 2 Ch. Rep. 167.

Poſt Caſe 343.

Deviſe of a Perſonal Eſtate to a Truſtee in Truſt for Teſtator's only Son, and the Heirs of his Body; and if his Son die during his Minority, and without Iſſue, then

THE Caſe aroſe upon the Will of Mr. *Whitmore*, who by Will, dated 18 *Jan.* 1675, deviſed the Surplus of his Perſonal Eſtate, being of the Value of 30000 *l.* to the Lord *Craven*, during the Minority of *William Whitmore* the Teſtator's only Son, for the Uſe of him and his Heirs lawfully deſcended from his Body, and to the Uſe of the Iſſue Male and Female deſcended from the Bodies of his Siſters *Eliz. Weld* deceaſed, *Margaret Flemiſh* and *Anne Robinſon*, in caſe his Son died during his Minority without Iſſue, and made his Son Executor, and the Lord *Craven* Executor during the Son's Minority. The Teſtator died

in

in 1678, his Son being about the Age of 13, and the Lord *Craven* proved the Will during the Minority of the Son; and afterwards the Son died without Iſſue, being at his Death of the Age of 18, and having never taken upon him the Executorſhip of his Father; and before his Death he made his Will, and thereby deviſed to his Wife (the Plaintiff) all his Eſtate Real and Perſonal, and what elſe he could give her, and made her ſole Executrix: And the Queſtion was, whether ſhe as Executrix to her Husband, or the Children of the Teſtator's Siſters, ſhould have this Perſonal Eſtate.

to *A*; and makes his Son Executor, and *B* Executor in Truſt for his Son during the Son's Minority. The Son lives to 18, and then dies without Iſſue; this Perſonal Eſtate ſhall go to the Executor of the Son, and not to *A*.

For the Plaintiff it was inſiſted, that here was an Eſtate by this Deviſe abſolutely veſted in the Son, and that no Words in the Will could afterwards diveſt it, and that it is againſt the nature of a Perſonal Eſtate to be thus limitted over; and the Son had by this Deviſe an abſolute Right in the Perſonal Eſtate, and might ſpend it or forfeit it: And the Caſe of *Clent* and *Ridges* was cited, where a Man deviſed 6000 *l.* a-piece to his Siſters, but if they ſhould happen to die before 21, he deviſed it over, and the Lord *Shaftesbury* in that Caſe decreed for the Remainder-Men, but that Decree was afterwards reverſed upon an Appeal to the Houſe of *Lords*; and it was much inſiſted on, that the Deviſe to the Lord *Craven* being during the Minority of the Son, *that* ought in this Caſe to be intended until he ſhould attain the Age of 17 Years; and the Lord *Craven* being alſo made Executor during the Minority of the Son, it ſhews the Teſtator intended that the Lord *Craven*'s Intereſt in the Perſonal Eſtate ſhould determine when the Son attained the Age of 17 Years, and the Perſonal Eſtate being then abſolutely veſted in him, cannot afterwards be diveſted.

For the Defendants it was inſiſted, that the Intent of the Teſtator and the Letter of the Will carried this Eſtate to them, and *that* Deviſe did well enough conſiſt with the Rules of Law, here being no Eſtate actually veſted in the Son, it being a Truſt in the Lord *Craven*; and that

during

during Minority was always taken in our Law to be till the Party attained the Age of 21 Years.

Lord Keeper ſaid he was troubled to ſee the Intent of the Party in any caſe diſappointed, but more eſpecially in the caſe of a Will, which is many times made in haſte, when there is not time for that Advice and Deliberation which may be uſed in other Caſes; and therefore as far as the Rules of Law will permit, the Intent of the Party ought to be ſupported; and ſaid, this Will might certainly have been ſo penned that it ſhould have gone over to his Siſter's Children: And he took the Queſtion touching the Minority, to be a conſiderable Point; and obſerved, that tho' an Infant at 17 might Adminiſter, yet he could not till he was of full Age commit a *Devaſtavit*; and ſaid, if it be a Truſt veſted, the Limitation over muſt not be indured; but if it be not veſted, it will come near the Caſe of *Maſſenburgh* and *Aſh*: But ſaid he would conſider of it, and have the Opinion of the *Judges*.

Tho' an Infant at 17 may Adminiſter, yet he can't commit a *Devaſtavit* until 21.

Ante Caſe 230. 298.

DE
Term. S. Trinitatis,

1 *Jacobi II.* 1685.

In Curia Cancellariæ.

Anonimus.

Case 324.

If a Member of Parliament ſues at Law, and a Bill is brought to be relieved againſt that Action, the Court will grant an Injunction till Anſwer or further Order.

Per Cur'. Tho' the Court will not proceed againſt a Member, that has Privilege of Parliament; yet if a Parliament Man ſues at Law, and a Bill is brought here to be relieved againſt that Action, the Court will make an Order to ſtay Proceedings at Law till Anſwer or further Order.

Hall verſus *Dunch.*

Case 325.

1 July.

At the Rolls. Sir John Churchil Maſter of the Rolls.

A. deviſes Lands, and then makes a Mortgage thereof in Fee. This is a Revocation in Law; but otherwiſe in Equity.

Poſt Caſe 334.

THE Caſe was, *I. S.* in 1663 by his Will in Writing deviſes the Lands in queſtion to *A.* in Tail Male, Remainder to the Plaintiff in Fee; and having afterwards Occaſion for Mony, mortgages theſe Lands in Fee, and in 1683 dies. *A.* being dead without Iſſue, the Plaintiff, who had the Remainder, brings his Bill to be let into the Benefit of this Deviſe. It was objected by the Council for the Defendant, who was the Heir at Law, that this Mortgage being a Mortgage in Fee, was an abſolute Revocation of the Deviſe; if it had been but a Mortgage for Years, then they did admit, the Reverſion would have

paſſed, and that would have carried with it the Equity of Redemption, and ſo the Revocation ſhould have been *pro tanto* only. But here being an Eſtate in Fee Mortgaged, *That* goes to the whole, and is a full and abſolute Revocation in Law; and being an abſolute Revocation in Law, there was no Reaſon for Equity to aid the Plaintiff againſt the Heir at Law. *Firſt*, Becauſe it is a Will made above 20 Years before the Death of the Party. *Secondly*, The Teſtator intended not an Immediate Eſtate to the Plaintiff, and he was but very remotely conſidered in the making this Will, the Teſtator having put the whole Eſtate in the Power of *A*, who having an Eſtate Tail might have barr'd the Remainder which was deviſed to the Plaintiff.

For the Plaintiff, It was inſiſted that this Mortgage ſhould be a Revocation only as to the Mortgage-Monies; and tho' in Law it was an Implicite Revocation of the whole Eſtate, yet Equity will conſider the Intent of the Party, which was only to ſupply his Occaſions with the Mony, and not done with a Deſign to revoke the Deviſe in the Will; and the Caſe of *Thorne* and *Thorne* was inſiſted on as a Caſe expreſs in Point, that a Mortgage, tho' in Fee, ſhall be a Revocation *pro tanto* only; and the Caſe of one *Haggott* in the time of the *Lord Keeper Coventry* was likewiſe cited, as alſo the Caſe of *Mountague* and *Jefferey's* in *Rolls*.

Ro. 1. Abridgement 616. Letter U. No. 21

The *Maſter* of the *Rolls* was of Opinion, that a Mortgage ſhould be a Revocation *pro tanto* only: And in regard there were Four or Five Witneſſes, who ſwore that after this Mortgage the Teſtator declared his former Will ſhould ſtand, the *Maſter* of the *Rolls* thought that was a new Publication of Will, and then certainly the Equity of Redemption well paſſed: tho' it was objected, that ſuch Paroll Declarations, ſince the Statute of *Frauds* and *Perjuries*, would not amount to a new Publication. And he ſaid, there were four things which Equity favour'd, *viz. Liverie, Attornment*, Aſſent to a Legacy, and the new Publication of

Four Things favoured in Equity.

of a Will: and in either of those Cases a slender Evidence would serve Turn.

And whereas the Defendant's Council pressed for a Tryal at Law, whether there was a new Publication or not, the *Master* of the *Rolls* said, the Cause must properly end here, and where the Court has a Jurisdiction as to the End, it must have likewise as to the Means; and since he was fully satisfied in the Evidence, he said, he would not send it to a Tryal at Law; and Decreed for the Plaintiff.

Masden versus *Bound.*

Case 326.
2 July.
Master of the Rolls in Court.
Depositions of a Witness examined *de bene esse*, he dying before he was examined in Chief, ordered to be read at a Tryal at Law.
Hard. n. 332. 1 Salk. r. 278. (3) Jo. Ch. J. r. 164. Raym. 335. 336.

THE Plaintiff examined his Witnesses *de bene esse* in *Michaelmas* Vacation, and in *Hillary* Term following the Defendant puts in an Answer, and about five Weeks afterwards, before any Replication filed, or Examination in chief, the Witness dies: And now it was moved by Mr. *Serjeant Maynard*, that the Plaintiff might be at Liberty to read this Deposition at Law; and in as much as by the strict Rules of the Common Law, no Depositions of Witnesses taken *de bene esse*, or before Issue joyned, can be read or given in Evidence, It was also pray'd that the Defendant might be order'd not to oppose the reading of this Deposition at a Tryal at Law; which the *Lord Keeper* held reasonable, for that otherwise an Examination *de bene esse* would be to no Purpose.

Mr. *Porter* this Day moved the *Master* of the *Rolls* to discharge this Order, because the Plaintiff had been negligent, or otherwise he might have examined his Witness in chief, the Answer having been put in above five Weeks before the Witness died; or he might have try'd the Matter at Law in *Hillary* Term, before the Death of the Witness. But it was answered, the Plaintiff could not go to Law before he had the Defendant's Answer, to see if he would confess the Matter of Fact; and that he stood out

two Months in Contempt before he would anſwer; and tho' the Plaintiff might have replied within the five Weeks, yet he could not well have examined in chief, the Witneſs and the Plaintiff both living in *Cheſhire*; and this was not ſuch a Lapſe of Time as ought to deprive him of the Benefit of the Evidence; and the rather, for that (tho' it is not regular by the Courſe of the Court) the Defendant's Commiſſioners join d in the Execution of this Commiſſion, ſo that here could be no foul Practice; and therefore the laſt Order was confirm'd.

Caſe 327.

Urlin verſus .....

Not neceſſary, in a Plea of a former Suit brought for the ſame Matter, to aver, that ſuch Suit is depending.

THE Defendant pleads that the Plaintiff brought a former Suit for the ſame Matters, which Suit is ſtill depending for ought he knows to the contrary.

For the Plaintiff it was inſiſted, that this Plea was not good, becauſe he does not poſitively aver that the former Suit is ſtill depending, and no Iſſue can be taken upon his Knowledge to the contrary.

But the *Maſter* of the *Rolls* allow'd the Plea, becauſe the Defendant ought not to have ſet it down to be argued, for by that he admits that the former Suit for the ſame Matter is depending, but the Plea ought to have been referr'd to a Maſter to examine whether there was a former Suit depending, for the ſame Matter, or not; and ſaid, there needs no poſitive Averrment that the former Suit is ſtill depending, for that is examinable by the Maſter; and the Defendant never ſwears a Plea of a former Suit depending, but it is always put in without Oath.

Plea of a former Suit depending for the ſame Matter is put in without Oath.

THIS Vacation died Francis *Lord* Guilford, Lord Keeper *of the Great Seal of* England, *at his Houſe at* Roxden *in* Comitat' Oxon. *And the Right Honourable* George *Lord* Jefferies, *Baron of* Wem, *Lord* Chief Juſtice *of* England, *had*

had the Cuſtody of the Seal deliver'd to him at Windſor, *by the Style and Title of* Lord Chancellor *of* England. *And Sir* Edward Herbert, *Chief Juſtice of* Cheſter, *was made Lord Chief Juſtice of* England, *and ſworn of his Majeſty's Privy Council*; *and Serjeant* Lutwich *was made Chief Juſtice of* Cheſter.

This Vacation alſo died Sir John Churchill, *the* Maſter *of the* Rolls, *at his Houſe in* Somerſetſhire; *and Sir* John Trevor, *the Speaker of the Houſe of Commons, was made* Maſter *of the* Rolls.

This Vacation alſo died Sir Thomas Walcott, *one of the Juſtices of the* King's-bench; *and Mr.* Baron Wright, *one of the* Barons *of the* Exchequer, *was removed into the* King's-bench; *and Sir* Edward Nevill *was made a* Baron *of the* Exchequer.

DE
Term. S. Michaelis,
1 *Jacobi II.* 1685.
In Curia Cancellariæ.

Case 328.

Bill not to be dismissed on 20*s.* Costs, but Defendant to be paid the Costs which he swears he is out of Purse.

THE *Lord Chancellor* declared, that he would not allow of the Rule of dismissing a Bill with 20*s.* Costs; but that for the future the Defendant should have the Costs he should swear he was out of Purse; but in such Affidavit he must specify the Particulars, that the Court may judge of the Reasonableness of them, if there should be occasion.

General Affidavit of having a material Witness not sufficient for a new Commission, but the Witness must be named in the Affidavit, as also the Point to which he is to be examined.

He also declared, that the general Affidavit of having material Witnesses beyond Sea, should not be sufficient for a new Commission, but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose.

Brathwaite versus *Brathwaite.*

Case 329.

24 Octobris. *In Court Lord Chancellor.* *A. B.* a Widower settles Lands to raise 100*l.* a Year for his eldest Son and 100*l.*

TEnant in Tail with the Remainder in Fee to himself levies a Fine, and settles his Estate on Trustees, in the first place to pay his Son and Heir 100*l. per Ann.* and then to make a Provision of 100*l.* a-peice for his younger Children, Sons and Daughters, to be raised and paid

paid according to their Seniority, and a Maintenance in the mean time.

a-piece for his younger Children, and afterwards he marries again, and has Children by his ſecond Wife.

In this Caſe the *Lord Chancellor* decreed, *firſt*, that whereas at the time of the Settlement, the Party that made it was a Widower and had eight Children by his firſt Wife, and declared he intended not to marry again, yet in regard he afterwards married a ſecond Wife, and had many Children by her, that the Children by this ſecond Wife were equally entitled with the Children of the firſt to have the Benefit of this Proviſion for younger Children.

Decreed the Children by the ſecond Wife were equally entitled with the other younger Children.

Secondly, That whereas the Deed directs the Proviſion for his younger Children ſhould be raiſed and paid according to their Seniority, that yet in caſe there ſhould happen a Deficiency, the Eldeſt ſhould not have more, and the younger leſs, but they ſhould be all paid in Average.

Tho' the Portions of the younger Children were by the Settlement to be paid according to their Seniority, yet in caſe of a Deficiency they ſhall be paid in Average.

Thirdly, That whereas many of the younger Children by the firſt Wife died in the Life-time of their Father, that the Adminiſtrators of the Children ſo dead ſhould have no Benefit of this Proviſion, but the ſame ſhould ceaſe; but in caſe any of the Daughters had been married in the Life-time of the Father, and died, the Husbands as their Adminiſtrators ſhould have had their Portions; and no certain time being appointed for Payment, but the ſame being left indefinitely, it does not naturally attach till the Death of the Father; and his *Lordſhip* took a difference betwixt a Portion or Proviſion, and a Legacy payable at the Age of 21 Years, *&c.*

The Portions of the younger Children who died in the Life of their Father, not to be raiſed in favour of the Adminiſtrators.

Otherwiſe if any of the Daughters had married in the Life of their Father, and afterwards died.

Fourthly, That whereas *Thomas* the Son and Heir, who was to have 100 *l. per Ann.* in the firſt place, had purchaſed in a Statute which was an Incumbrance on the Eſtate, that he ſhould be allowed no more than what he really paid for it; and that the whole Eſtate muſt in the firſt place be looked on as liable to ſatisfy this Incumbrance, and then to raiſe the 100 *l. per Ann.* and Arrears,

The Heir buying in an Incumbrance on the Eſtate charged with the Portions, allowed no more than what he really paid.

Vide the next Caſe.

and the Surplus for raiſing the Proviſions for younger Children, but that their Maintenance ſhould go on in the mean time.

Phillips verſus *Vaughan.*

Caſe 330.
27 Octobris.
In Court, Lord Chancellor.

A Stranger gets an Aſſignment of a Mortgage for leſs than is due.

The Mortgagor or his Heir ſhall not redeem without paying the whole that is due.

A. Mortgages his Land to *B.* *C.* a Stranger buys the Intereſt of *B.* for leſs than was really due on the Mortgage, and the Heir of the Mortgagor brings his Bill to redeem, and the Queſtion was, whether *C.* ſhall be allowed more than he really paid.

For the Plaintiff it was inſiſted, that a Stranger purchaſing an Incumbrance, that had no Intereſt before in the Eſtate, ſo that it was not to protect his Purchaſe or any thing of that nature, ought to be allowed no more than he really paid.

Lord Chancellor. This Caſe has neither Point nor Edge; for there is no Colour why, when the Heir of the Mortgagor comes to redeem the Mortgage, he ſhould not pay the whole that is due on the Mortgage. If another Man has met with a good Bargain, there is no Equity for the Heir of the Mortgagor to deprive him of the Benefit of it, and make an Advantage thereof unto himſelf: But if a Man had purchaſed without Notice of this Incumbrance, he might poſſibly have had an Equity to have redeemed the Incumbrance for what was really paid for it.

Oldfield verſus *Oldfield.*

Caſe 331.
27 Octobris.
In Court Lord Chancellor.

One by his Will gives 3000 *l.* to his younger Children, which was ſecured by Mortgage from

SIR *John Oldfield* by his Will amongſt other things deviſes as follows, *viz.* *Item,* I give 3000 *l.* to be equally divided amongſt *A.* *B.* and *C.* my three younger Children, which ſaid Sum is in the Hands of Sir *John Tufton*; and in his ſaid Will he adds this Clauſe, *viz.* And

for

for the more ſure Payment of the ſaid Sum, in caſe his Son and Heir, whom he thereby appointed his Executor, ſhould not pay the ſame according to his Will, then he deviſed his Lands to his younger Children for the raiſing and Payment thereof, and appoints the ſame to be paid unto them at 21 or Marriage, which ſhould firſt happen, and a Maintenance out of his Lands in the mean time.

A. and declares that if his eldeſt Son does not pay this 3000 *l.* then his Lands ſhall go to the younger Children. *A* brings a Bill to redeem his Mortgage, and to pay in his Mortgage-Mony, and pays it purſuant to the Decree, and the Maſter puts it out upon a Security that proves ill. The eldeſt Son ſhall not be compelled to pay it over again to his younger Brothers.

Sir *John Tufton* being minded to pay in this 3000 *l.* exhibits his Bill againſt the Executor and the Infants, who appeared by their Mother as their Guardian, and obtains a Decree for Redemption of his Mortgage, and a *Maſter* is appointed to ſee the Monies put out on Security for the Benefit of the Infants. The *Maſter* makes his Report, and thereby approves of Securities for placing out the Mony, *viz.* Sir *Robert Viner*'s Bond for 1000 *l.* Alderman *Backwell*'s Bond for another 1000 *l.* and *Meynell*'s Bond for the third 1000 *l.* and the Mony is put out accordingly.

Theſe Perſons proving inſolvent, the Infants by their now Bill would reſort to the Lands, and charge the Eſtate of the Heir with this 3000 *l.*

The Council for the Plaintiffs urged, that where there were two Funds for ſecuring the Payment of Infants Portions, if one failed they might reſort to the other; and put this Caſe, that if a Man by his Will had charged the Lands of his Heir for Payment of Portions to his younger Children at 21 or Marriage, and the Heir in the Minority of the younger Children ſhould exhibit his Bill to pay in the Monies and have his Lands diſcharged, the Court of Chancery in ſuch Caſe would not diſcharge his Lands; nor in any Caſe, where Infants were concerned, change a real into a perſonal Security.

But the *Lord Chancellor*, upon the firſt opening of the Cauſe, took the Caſe to be clear againſt the Plaintiffs; for that the Intention of the Teſtator appeared to be that

there ſhould be an effectual Payment of the 3000 *l.* For Sir *John Tufton*'s Security might have failed, or his Heir and Executor might have received it of him, and have refuſed or neglected to have paid it over to the Infants; and in either of thoſe Caſes the Lands ſhould have been charged; but they were only ſupplementally chargeable, in caſe of ſuch a Defect or Deficiency: But here, when there has been a real and effectual Payment, and the Monies put out upon Securities, which could not then be objected againſt, but were approved of by the Mother of the Infants, who by Will was made their Guardian, and allowed of by the Court, there could be no Reaſon after all this, that the Heir ſhould be charged with theſe Monies; nor can it be an Objection that the Monies were paid in before the time appointed by the Will, *viz.* before the Infants were either married or had attained 21 Years of Age, for it was not in the Power of the Heir and Executor to compell Sir *John Tufton* to keep the Monies in his Hands, when he was minded to pay it in; and ſaid, the Caſe put by the Plaintiff's Council was not like this, but admitted that the Lands of the Heir, when charged for Payment of Portions to Infants at 21 or Marriage, ſhall not be diſcharged before that time, nor that a real Security for Infants Portions ſhall be changed into a Perſonal one, where the Lands are originally charged; but here the Lands were only ſupplementally charged, in caſe the 3000 *l.* had not been effectually paid; and the Payment made in this Caſe he adjudged to be effectual, and according to the Intent of the Teſtator, and therefore diſmiſſed the Bill.

Lands of an Heir are charged with Portions to Infants at 21 or Marriage: the Portions ſhall not be admitted to be paid in before they grow due, in eaſe of the Land.

Caſe 332.

Eodem die.

In Court, Lord Chancellor.

Duke of Southampton, *as Adminiſtrator of his late Wife,* Plaintiff.

Cranmer *& al'. Executors of Sir* Henry Wood, Defendants.

THE Bill was brought by the Duke of *Southampton*, who married the Daughter and Heir of Sir *Henry Wood*,

Wood, as Administrator to his late Wife, for an Account of the Personal Estate of his said Wife, *viz.* the Profits of her real Estate received by Trustees in her Life-time. The Case arose upon the Construction of a Deed of Settlement and Will made by Sir *Henry Wood*, wherein, amongst other Things, it was recited, that a Marriage was intended between the Duke of *Southampton* and the Daughter of Sir *Henry Wood*; and then comes a Clause, that in case the Daughter should live to attain the Age of *Sixteen* Years, and should refuse to marry the said Duke of *Southampton*, then the said *Duke* should have 20000 *l.* out of his Personal Estate; and afterwards there is another Clause to this Effect, *viz.* And if it shall happen, that the said intended Marriage shall not be had till after his Daughter attained her Age of *Sixteen* Years, then he upon such Marriage had, settles his Real and Personal Estate upon the Duke and his intended Wife for their Lives, *&c.*

The Marriage takes Effect, the Lady being under the Age of *Sixteen* Years; she lives to attain *Sixteen* Years, and before *Seventeen* dies without Issue.

The Defendant's Council would have it, that by this Settlement, to which the Will refers, the Personal Estate was not vested, so as to intitle the Administrator of the Wife, by reason the Marriage was had before she attained the Age of *Sixteen*; and that it was Sir *Henry Wood*'s Intent to restrain his Daughter from marrying before she attained that Age.

Lord Chancellor. I take the Intent to be quite otherwise. The Thing chiefly aimed at was that there might be a Marriage had betwixt the *Duke* and Sir *Henry Wood*'s Daughter, and for that Intent is the Clause of 20000 *l.* Penalty, in case at *Sixteen* Years of Age she should refuse to marry him; and this latter Clause is only to bring in that 20000 *l.* again into the Personal Estate, and to be set-

ſettled to the ſame Uſes with the reſt, in caſe the Marriage ſhould be had after her Age of *Sixteen* Years; and to me it does in no ſort imply, that they might not marry before that time; and therefore decreed an Account, *&c.*

Caſe 333.
4 Novembris.

In Court Lord Chancellor.

One ſeized in Fee of Lands limits a Term to Truſtees for a *Hundred* Years, upon ſuch Truſt as he by Deed or Will ſhould appoint, and for want of ſuch Appointment to attend the Inheritance; and afterwards by a *nuncupative* Will gives *All, All* to *I. S.* and being a Baſtard dies without Iſſue: this will not paſs the Truſt of the Term.

Thruxton verſus *Attorney Gen.*

A Man ſeized of Lands in Fee, by Settlement limits a Term for a *Hundred* Years to Truſtees in Truſt for ſuch Uſes, Intents and Purpoſes, as he by Deed or Will in writing ſhould declare, direct, limit, or appoint, and for want of ſuch Will or Deed to attend the Inheritance. This Man being a Baſtard dies without Heir, having firſt made a *nuncupative* Will, and thereby deviſed as follows, *viz. I Give All, All to I. S.* who had now Adminiſtration with the Will annext; and the Queſtion was whether this Term ſhould eſcheate with the Inheritance.

It was inſiſted by the Council for the Plaintiff, *Firſt,* That this was not a Prerogative Caſe, and there was no Difference in the Caſe of an Eſcheate, whether the Lands were to come to the King or to the Meſne Lord.

Secondly, A Term limited to attend the Inheritance does not at Common Law attend the Inheritance, for there in the Eye of the Law it is a Term for Years, and muſt go in a Courſe of Adminiſtration, if Equity did not interpoſe; and where the Caſe does not carry an Equity along with it, the Chancery ought not to interpoſe, but let the Law take Place: and an Eſcheate (which is properly only where there is no other Perſon to take) is not to be favoured in Equity, eſpecially where it turns to the Wrong of a third Perſon; and even in Equity a Term limited to attend the Inheritance ſhall in many Caſes be ſevered from it, as if a Man dies indebted, a Term limited to attend the Inheritance ſhall be Aſſetts, and made liable to his Debts.

Thirdly,

Thirdly, Where a Man comes in Paramount him who limited a Term to attend the Inheritance, as the Lord by Eſcheate does, he comes in *le poſt*, and ſhall have no Benefit of the Term; and for that Reaſon it was ruled in the Caſe of *Pheaſant* and *Pheaſant*, that a Widow, who claimed Dower, coming in Paramount, ſhould have no Benefit of the Term, that was limited to attend the Inheritance.

Fourthly, That this nuncupative Will was long before the Statute of *Frauds* and *Perjuries*, and then a Man might diſpoſe of a Truſt by Parol; and that the Word *All* in this nuncupative Will would certainly carry the Term; and therefore it was inſiſted, that it was well appointed to the Adminiſtrator with the Will annext.

A Term veſted in Truſtees is not Aſſetts to pay Debts; otherwiſe if the Term be in the Party himſelf, and the Inheritance in Truſtees.

Lord Chancellor. I do not take it, that what Mr. *Serjeant Pemberton* laid down as an eſtabliſhed Rule, is ſo; for if a Man ſeized in Fee raiſes a Term and lodges it in Truſtees to attend the Inheritance, and afterwards dies indebted, I never heard, that that Term ſhould be made Aſſetts, but have heard it often denied: But indeed where the Inheritance is in Truſtees, and a Man has a Term in his own Name, which is limited to attend the Inheritance, and dies indebted, the Term in that Caſe ſhall be liable to his Debts; for it is Aſſetts at Law. But as to the Principal Caſe I take the Queſtion to be no more than, whether a Term attendant on the Inheritance may eſcheate or not, for if it will in any Caſe, it muſt eſcheate here. I agree that generally ſpeaking a Man before the Statute of *Frauds* and *Perjuries* might diſpoſe of a Truſt by Parol; and I alſo agree, that the Words, *All*, *All*, would be ſufficient to paſs a Leaſe for Years; but in this Caſe the Term being ſettled by Deed expreſsly upon theſe Truſts, *viz.* for ſuch Uſes, Intents and Purpoſes as he by Deed or his laſt Will in writing ſhould appoint, and in Default of ſuch Appointment then to attend the Inheritance, this reſtrains and tyes up his Hands from making any Parol Diſpoſition: and I

take his Intent by the Words *All, All,* to be all that he could diſpoſe of by Parol; and ſo the King in this Caſe is not in barely in the *Poſt,* but in the *Per* alſo; for the Term for Years goes with the Inheritance by the Expreſs Limitation of the Party.

Hall verſus *Dunch.*

Caſe 334.
27 Novembris.
Lord Chancellor.
Ante Caſe 325.

THIS Cauſe coming this Day to be heard before the *Lord Chancellor,* upon an Appeal from the Decree of the *Maſter* of the *Rolls,* he confirmed the Decree, and declared, tho' the Mortgage in Fee was a Revocation at Law, yet in Equity it ſhould not be taken for a total Revocation; but the Deviſee ſhould be admitted to the Redemption; for the Intent of the Mortgagor making the Mortgage could be no other than only to ſerve his ſpecial Purpoſe of borrowing Mony to ſupply his preſent Occaſions.

Jevon verſus *Buſh.*

Caſe 335.
Eodem die.
In Court.

A Truſtee in a Recognizance releaſes it without any Conſideration. Decreed to pay the Principal and Intereſt not exceeding the Penalty.

HENRY *Beard* Lord *Bellamount* in 1647 being about to leave *England,* and having been in Arms for *King Charles* the *Firſt,* and under great Oppreſſions from the then uſurped Powers, lent 600 *l.* to one *Gardiner* of *Croydon* on a Recognizance of 1000 *l.* which he took in the Name of the Defendant *Buſh,* and intended it as a Proviſion for the Plaintiff his Infant Daughter, then but two Years old; and *Buſh* at the ſame time executed a Declaration of the Truſt, and covenants that the Plaintiff might receive and enjoy the full Fruit and Benefit of this Security, without any Hindrance or Diſturbance from him or any claiming under him. Soon afterwards the Lord *Bellamount* goes beyond Sea, and dies in *Perſia* in 1654. *Gardiner* being about to ſell his Eſtate, and the Purchaſor having Notice of the Recognizance, *Buſh* is prevailed upon to acknowledge

Satis-

Satisfaction; and in 1657, and not before, the Plaintiff had Notice of this Declaration of Truſt, and underſtanding that *Buſh* had acknowledged Satisfaction on this Recognizance, brings her Bill to be relieved againſt this Breach of Truſt.

The Defendant by Anſwer inſiſted, and it was ſo proved in the Cauſe, that he was but 18 Years old when he made this Declaration of Truſt; and inſiſted likewiſe, that tho' the Truſt was declared to be for the Benefit of the Infant, yet it was only to protect the Father's Eſtate, who was obnoxious to thoſe Times, and that he never had one Penny, directly or indirectly, for his acknowledging Satisfaction on that Recognizance, nor ever had the Recognizance in his Cuſtody; but the Lord *Bellamount*'s Widow delivered up the ſame, and, as he believes, received the Monies due thereon; and that he, at her Requeſt, or by her Order, or by the Order of the Lord *Bellamount*, acknowledged Satisfaction on the Recognizance, and believes he had ſome Warrant or Order in Writing from them or one of them for acknowledging Satisfaction thereon, but that the ſame was burnt or loſt in the Fire of *London*; and inſiſted that after all this length of time, Satisfaction being acknowledged in 1654, above 30 Years ſince, he ought not now to be charged with a pretended Breach of Truſt.

The Council for the Defendant inſiſted, that the Plaintiff ought to prove ſome Fraud in the Truſtee, or that he received to his own Uſe part of the Mony.

Lord Chancellor. The Proof lies on the Defendant's Side; he ought to diſcharge himſelf, and it is not ſufficient for him to ſay he never received any of this Mony for his own Uſe: There is no doubt but an Infant may be a Truſtee; and the Breach of Truſt was committed in 1654, after he was of full Age; and therefore decreed him to pay the Principal Mony with Damages not exceeding 1000 *l.* being the Penalty of the Recognizance; and cited my Lord *Hobart*,

An Infant may be a Truſtee.

Hobart, who ſays that *ceſtuy que truſt* in an Action of the Caſe againſt his Truſtee ſhall recover for a Breach of Truſt in Damages.

Caſe 336.

Darnell verſus *Reyny.*

Where there is an Anſwer to part, and a Plea to the reſidue, the Plaintiff can't except to the Anſwer till the Plea is argued, or an Order obtained that it ſhall ſtand for an Anſwer with liberty to except.

WHERE the Defendant anſwers to part, and pleads to all other Matters not anſwered unto, the Plaintiff can't put in Exceptions to the Anſwer till he has firſt argued the Plea, or obtained an Order that the Plea ſhall ſtand for an Anſwer with liberty to except to the Matters not pleaded unto.

Caſe 337.

Popham verſus *Bampfield.*

THE Parliament being Prorogued, you may proceed in the Account in this Court, notwithſtanding the Appeal.

Caſe 338.

Frederick verſus *David.*

Proceſs.

UPON an Affidavit that the Defendant *David* was gone into *Holland* to avoid the Plaintiff's Demand againſt him, and he having been arreſted on an Attachment, and a *Cepi Corpus* retorned by the Sheriff, the Court upon a Motion granted a *Serjeant at Arms* againſt him, and upon the Retorne thereof granted a Sequeſtration.

Note, When a *Cepi Corpus* is once retorned, there is an end of all manner of Proceſs, (for no *Proclamation* or *Commiſſion* of *Rebellion* goes after that) and tho' a Meſſenger of late Years has been uſually granted in ſuch Caſes, yet he is but a new Officer, and ſubordinate to the *Serjeant at Arms*; but regularly in ſuch a Caſe you ought to move, that

that the Defendant may enter his Appearance, and be examined within four Days, or ſtand committed.

Beckford verſus *Beckford.*

Caſe 339.

7 Decembris. *In Court, Lord Chancellor.*

Mony to be brought into *Hotchpott* by an Orphan ſhall be brought into the Orphanage part only.

2 Ch. Rep. 119.

THE only Point was upon the Cuſtom of the City of *London*, where a Child that had a Portion, but was not fully advanced, and was to bring her Portion into *Hotchpott*, whether the Portion ſhould be brought into the Perſonal Eſtate in general, that ſo the Widow might come in for part of it, or whether it ſhould be brought into the Orphanage part only.

Lord Chancellor. It is beyond all doubt that it muſt be brought into the Orphanage part only.

Annand verſus *Honeywood.*

Caſe 340.

Eodem die. *In Court, Lord Chancellor.*

Mony given by a Freeman of *London* to be laid out in Land, and ſettled on his eldeſt Son for Life, Remainder to his firſt and other Sons in tail, ſhall not be reckoned any part of his Advancement, and be brought into *Hotchpott*.

2 Ch. Rep. 117, 129.

THE Point here alſo ariſing on the Cuſtom of the City of *London*, the Queſtion was, whether Mony given by the Father to be laid out in Land to be ſettled on his eldeſt Son for Life, Remainder to his firſt, ſecond, third, *&c.* Sons in tail, ſhould be reckoned to be an Advancement by part of the Perſonal Eſtate of the Father, ſo as that the Son ought to bring the ſame into *Hotchpott*, to entitle him to a ſhare of the Perſonal Eſtate.

Lord Chancellor. There is no Colour to reckon this any part of the Perſonal Eſtate.

Tunbridge verſus *Teather.*

Caſe 341.

8 Decembris. *In Court, Lord Chancellor*

Marriage Articles to lay out 1000 *l.* in a Purchaſe of

A Man upon his Marriage, in Conſideration of 500 *l.* Portion, by Articles precedent to the Marriage, Covenants with Truſtees to add 500 *l.* more to his Wife's Por-

Land to be settled on Husband and Wife for their Lives, Remainder to the Iſſue of the Marriage, Remainder to the Husband in Fee. Husband lays out the 1000 *l.* in the Purchaſe of a great Houſe and Gardens, and Farm, which would let but at 25 *l. per Ann.* It is a good Performance of the Articles.

tion, and that it ſhould be laid out in Land, and ſettled to the uſe of the Husband for Life, Remainder to the Wife and the Iſſue of her Body by him, Remainder to the right Heirs of the Husband. The Husband without the Conſent of the Truſtees purchaſes a Farm, on which there was a great Houſe and Gardens, and pays 1000 *l.* for it, tho' in Truth it was worth no more than 25 *l. per Ann.* and takes the Conveyance to him and his Heirs, and afterwards ſettles it to the Uſes in the Articles.

The Bill was to have the defective Value ſupplied: And for the Plaintiff it was inſiſted, *firſt*, that this was not a Settlement according to the Articles, becauſe the Purchaſe was made to the Husband and his Heirs, and he afterwards ſettles it to the Uſes in the Articles; whereas if it had been bought with the Wife's Mony, and the Conveyance had been made to the Uſes in the Articles, then the Eſtate had not moved from the Husband, and conſequently it would not have been a Jointure within the Statute of the 11 *H.* 7. and then the Wife being Tenant in tail might have aliened it. *Secondly*, One thouſand Pounds being to be laid out as a Proviſion for the Wife, it muſt be intended a reaſonable Proviſion, and it could not be expected that 1000 *l.* ſhould produce leſs then 50 *l. per Ann.* and it was not intended to be in the Power of the Husband to defeat ſuch Proviſion by laying out the 1000 *l.* in a fine Houſe and Garden, which would not ſerve to buy Bread for the Widow; and this appears more plainly from another Clauſe in the Articles, by which in caſe a Purchaſe was not made according to the Articles, the Wife was to have 700 *l.* in Mony, or 50 *l. per Ann.* at her Election.

But the *Lord Chancellor* was of Opinion, that the Husband having really laid out 1000 *l.* in the Purchaſe, and the Father of the Plaintiff having viewed the Eſtate before the Purchaſe was made, tho' it was not of ſo good a Value as might have been purchaſed with 1000 *l.* it muſt be taken as a Performance of the Articles; and therefore diſmiſſed the Bill.

Knight

Knight verſus *Calthrope.*

Caſe 342.
Eodem die.
In Court.

A on his Marriage ſettled a Rent-charge on his Wife for her Jointure, and afterwards deviſes to the Wife part of the Land charged with the Rent-charge. 'Bill is that the Rent-charge might be apportion'd. Bill diſmiſſed.

A Man upon his Marriage charges his Lands with a Rent-charge for the Jointure of his Wife, and afterwards by his Will deviſes Part of theſe Lands to his Wife. The Plaintiff's Bill was that the Lands deviſed to the Wife might bear their Proportion of the Rent-charge; otherwiſe the reſt of the Lands, that were not ſufficient to pay the Rent, would be clogg'd with the Arrears, which in time would ſwallow up the Inheritance.

Lord Chancellor. The Grantee of the Rent-charge may diſtrain in all or any Part of the Lands for her Rent, and there is no Reaſon to abridge her Remedy in Equity; and the Husband certainly intended her ſome Benefit by this Deviſe, and he has not declared it ſhould be accepted in part of the Rent-charge; and therefore diſmiſſed the Bill.

Witmore verſus *Weld & al'.*

Caſe 343.
Eodem die.
In Court.
Ante Caſe 323.

UPON the *Lord Chancellor*'s coming to the Seal the Plaintiff obtained an Order to have this Cauſe heard before his Lordſhip, and not to ſtay for the Judges Certificate; and this Day coming on to be heard accordingly, the *Lord Chancellor* was of Opinion, that the Deviſe to the *Lord Craven* during the Minority of the Teſtator's Son upon the whole complexion of the Will ſhould determine, when the Son attained *Seventeen* Years of Age; and *Secondly*, had that been otherwiſe, yet it was a Truſt veſted in the Son, and the Remainder over was void; and therefore decreed for the Plaintiff, and ſaid, if the Matter in Queſtion had been but for 100 *l.* it would not have held an Hour's Debate.

Red-

Redman verſus *Redman.*

Caſe 344.
9 Decembris.
In Court, Lord Chancellor.

Upon a Treaty of Marriage between *A* and the Daughter of *B*. *B* would not conſent to the Marriage, for that *A* owed 200 *l.* to *I. S.* to remove which Objection, the Brother of *A* propoſes to get up *A*'s Bond and to give his own in the room of it. But privately *A* gives a Counter Bond to his Brother, and the Daughter of *B* is privy to this and encouraged it. *A* dies, his Wife takes Adminiſtration. The Wife ſhall avoid this Counter Bond tho' Party to the Fraud. Alſo *A* himſelf might have been relieved againſt this Counter Bond.

THE Caſe was, that upon a Treaty for a Marriage between *Charles Redman* and the now Plaintiff, the Plaintiff's Father would not conſent to the Match, by reaſon that *Charles Redman* was indebted in the Sum of 200 *l.* to one *Bryan*, for which he and *Joice* his Mother ſtood bound in a Bond: to remove this Obſtruction, *Henry Redman* (younger Brother of *Charles*) and *Joice* the Mother give a new Bond to *Bryan* for the Payment of this Debt; and thereupon the Bond wherein *Charles* was bound was delivered up to be cancelled: but *Charles* gives his Brother *Henry* a Counter Bond to indempnifie him againſt this Debt; and paid the Intereſt of the 200 *l.* to *Bryan* during his Life; and it was in Proof in this Cauſe, that the now Plaintiff, the Widow of *Charles*, was privy to all this Matter, and that ſhe being in love with *Charles* contrived this way to ſatisfie her Father, that the Marriage might take Effect; But now being ſued by *Henry* on the Counter Bond, as Adminiſtratrix to her Husband, ſhe brought her Bill to be relieved.

The Defendant's Council inſiſted, that *Henry* became bound in this Bond voluntarily, having no manner of Obligation on him to pay this Debt for his elder Brother, but it was done at the Inſtance and Requeſt of his Brother and the now Plaintiff, who contrived this means to bring the Match about; and inſiſted that if *Charles* himſelf had been Plaintiff, he ſhould not have been relieved againſt this Counter Bond: And his Adminiſtratrix, who was privy to this Tranſaction, could have no better Right than *Charles* had.

Lord Chancellor. This is a plain Fraud, and by this Contrivance the Father of the Plaintiff was drawn in to give the greater Portion; and he abſolutely refuſed to marry his Daughter,

Daughter, 'till *Charles* was made a clear Man, and particularly diſcharged of this very Debt; and tho' *Henry* had no obligation on him to become bound for his elder Brother's Debt, yet it was all one to the Plaintiff's Father which Way that Debt became diſcharged; but that was to be firſt done, let it be one Way or other: And declared, that in Caſe *Charles* himſelf had been the Plaintiff he ſhould have been relieved; but the Caſe was ſtronger, becauſe if this Bond ſhould be ſuffered to lye on *Charles*'s Eſtate, it might ſwallow the Aſſetts, and defraud his Creditors; as it alſo injured the Plaintiff in the Right ſhe had by the Cuſtom of *London* to the Perſonal Eſtate of her Husband; and therefore decreed the Bond to be delivered up.

Hale verſus *Thomas.*

Caſe 345.
18 Decembris *In Court.*
2 Ch. 182, 186.

IN 1638, thoſe, under whom the Defendant now claims a Debt of 1300 *l.* Principal Mony then lent, acknowledged a Judgment for 2000 *l.* Penalty, defeazanced for the Payment of the Principal Monies with Intereſt. The Defendant for *ten* or *twelve* Years together had kept the Plaintiff out of his Debt, by fencing with prior Incumbrances, which were in truth ſatisfied, and by ſetting up a pretended Entail, which on a Tryal at Law was found againſt him. The Plaintiff had exhibited a former Bill, and thereby only pray'd, that the Defendant might come to an Account and accept what, if any Thing, ſhould be found to be due to him on thoſe prior Incumbrances, and that the Plaintiff might be let into a Satisfaction of his Debt; but did not pray further, as he might have done, that if the Defendant ſhould be found to have raiſed or received more than was due to him, that he might pay over the Surplus to the Plaintiff; and upon the Account taken in the ſaid Cauſe it was found, that the Defendant was over paid with a Surplus of 4000 *l.*

The Plaintiff's now Bill was, that he might have thoſe Monies towards his Debt, and be ſatisfied his Principal Monies with Intereſt and Coſts; and the Matter came on now to be argued on the Defendant's Plea, who had pleaded the former Bill brought by the Plaintiff, and the Proceedings thereon, and that after the Account taken in the former Cauſe, the Plaintiff had proceeded at Law, and revived his Judgment by *Scire fac.* and taken Execution by *Elegit*, and that thereupon the Defendant had brought the whole Penalty of the Bond into the Court of *Common-Pleas*, and inſiſted that a Court of Equity ought not to charge him beyond the Penalty of the Judgment; and this Plea was allowed by the Court. Not but that Equity may, and in many Caſes doth, carry on the Debt beyond the Penalty of the Security, as where the Party hath been delayed by Injunction of this Court, and the like; but it was obſerved, that where it has been ſo done, it has been always againſt a Plaintiff, when he hath come for Relief: But there is no Precedent where a Plaintiff in this Court ſhall charge a Defendant beyond the Penalty, and further than he could charge him at Law: But in this Caſe the Court allowed the Plea, principally becauſe the Plaintiff after the Account taken in the former Cauſe had ſurceaſed his Proſecution in this Court, and proceeded at Law, having ſued forth a *Scire fac.* on his Judgment, and taken forth Execution, and therefore having elected to proceed at Law, he ſhould not now reſort back to Equity; eſpecially as this Caſe is, where he hath taken Execution by *Elegit*, which charged a Moiety of the Lands only, and now would come for a Decree in Equity for the ſame Debt, which would charge the Perſon and the whole Eſtate, and therefore the Court allowed the Plea.

Equity in ſome Caſes carries the Debt beyond the Penalty; as when a Debt is due to a Perſon, and he is kept out of it by an Injunction.

But a Plaintiff in Equity can't charge the Defendant beyond the Penalty any more than he can at Law.

Note, In this Caſe the Plaintiff thought it moſt for his Advantage to proſecute at Law, expecting to have held the Lands at the extended Value, and if the Defendant had come for Relief in Equity he ſhould not have redeemed or charged the Plaintiff with the real Value, unleſs

leſs the Defendant would have offered to pay the whole Principal Monies with Intereſt and Coſts. But as ſoon as the Plaintiff had extended at Law, Mr. *Serjeant Maynard*, the Defendant's Council, adviſed him to bring a *Scire fac.* againſt the Plaintiff to ſhew cauſe why the Extent ſhould not be taken off on Payment of the Penalty of the Judgment, which he at the ſame time offered to pay, and brought it into the Court of *Common-Pleas*.

Noſworthy verſus *Baſſet.*

Caſe 346.

Eodem die. *In Court, Lord Chancellor.*

Whether after a Plea or Demurrer to a ſpecial Replication allowed, the Plaintiff may be admitted to put in a general Replication.

THE Plaintiff having filed a ſpecial Replication, the Defendant put in a Plea and Demurrer to the Replication; his Plea was, that ſince his Anſwer put in, he had recovered the Eſtate in queſtion in an Ejectment upon full Evidence at a Tryal at the Bar; and Demurred to other ſpecial parts of the Replication.

The Plaintiff's Council admitted the Plea and Demurrer to be good, which were therefore allowed by the Court; but the Court refuſed to declare any Opinion, whether the Plaintiff might not, notwithſtanding the Plea and Demurrer were allowed, afterwards put in a general Replication: And the Plaintiff's Council conceived they might, becauſe the Plea and Demurrer were tied up to that Replication only; but ſeemed to admit, that it might have been ſo pleaded, as that the Matter ſettled by the Tryal at Law ſhould not have been drawn into Iſſue or examined unto.

Anonimus.

Caſe 347.

In a Bill of Interpleader, a Tryal at Law is directed between the Defendants. The Suit is thereby ended as to the Plaintiff, ſo that if the

UPON a Motion it was declared by the Court that a Cauſe having been heard upon a Bill of Interpleader, and a Tryal at Law directed to ſettle the Right between the Defendants, there is an end of the Suit as to the

Plaintiff dies, Defendants may proceed without reviving the Cauſe.

the Plaintiff; ſo that if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor, each Defendant being in the nature of a Plaintiff.

Caſe 348.
Lord Chancellor.

Oddy verſus *Torlas.*

THE Plaintiff having agreed with the Defendant for the Office of Clerk of the *Bridge-houſe* for 950 *l.* depoſited 500 *l.* in Mony; and a Bond of 900 *l.* Penalty was entered into by himſelf, with a ſufficient Surety for 450 *l.* more, which was to be delivered to the Defendant upon his Surrender of his Office to the Plaintiff; the Plaintiff was admitted, and the Defendant received the 500 *l.* and the Bond, and afterwards came to an Agreement with the Plaintiff, that the Plaintiff ſhould pay him 80 *l.* yearly until the 450 *l.* was paid off. The Plaintiff had paid him on that Account ſo much as exceeded the 450 *l.* and Intereſt by 300 *l.*

The Plaintiff's Bill was therefore to have the Articles for Payment of the 450 *l.* and 80 *l. per Ann.* in the mean time, and a Judgment on a Bond for Performance of Covenants, delivered up, and the Surplus of the Mony repaid with Intereſt.

The Defendant inſiſted, that it having been tried in the *Common-Pleas*, whether the Contract was uſurious, by Rule of that Court, and there found not to be uſurious, and there being ſtill a great deal of Mony due to him on that Account, the Plaintiff ought not to be relieved without Payment of it: But it appearing to the Court that the firſt Agreement which was made with the Plaintiff's Friends Privity was for 950 *l.* and that they were not privy to the ſecond Agreement; but the Plaintiff's Neceſſity was worked upon therein; for that, as it was penned, the Plaintiff was to pay 80 *l. per Ann.* till the 450 *l.* and every part of it was paid, ſo that if there were but 5 *l.* of it unpaid, yet

the Plaintiff must pay 80 *l. per Ann.* till it was paid; the *Lord Chancellor* declared, that if the Plaintiff had paid beyond 950 *l.* and Interest, he should pay no more; but for what was actually over-paid he would not relieve him: But decreed, that what Mony had been brought into Court by the Plaintiff to continue the Injunction should be delivered out of Court to him, and that the Defendant should acknowledge Satisfaction on the Judgment, and deliver up the Articles and Bonds.

John Kew versus *Rouse* and his Wife.

Case 349.

Jan. 1685. *Lord Chancellor.*

A Devise of a Term to *A* and *B*, paying 25 *l.* a Year out of the Rents to one during his Life; *viz.* 12 *l.* 10 *s.* by each of them, is a Tenancy in Common.

THE Plaintiff's Wife, whose Administrator he is, and the Defendant's Wife were the two Daughters of *Elizabeth Wise*, who being possessed of a Term for Years, in *April* 1679 devised that Term and all her Interest therein unto her two Daughters, they paying yearly to her Son 25 *l.* by quarterly Payments, *viz.* each of them 12 *l.* 10 *s.* yearly out of the Rents of the Premisses during his Life, if the Term so long continued. The Plaintiff's Wife being dead, the Defendant claims the whole by Survivorship; and whether it was a Joint Tenancy or a Tenancy in Common was the Question.

The *Lord Chancellor* conceived it clearly to be a Tenancy in Common; for that 25 *l. per Ann.* was to be paid by the two Daughters equally in Moieties; and decreed an Account of the Moiety of the Profits to the Plaintiff, as Administrator to his Wife.

DE
Termino S. Hillarii,

1 & 2 *Jacobi II.* 1685.

In Curia Cancellariæ.

Bechinall verſus *Arnold.*

Caſe 350.
16 Januarij.
In Court Lord Chancellor.

Deviſee ſhall not examine Witneſſes in *perpetuam rei memoriam* to prove a Will againſt a Purchaſor without Notice, till the Will has been eſtabliſhed by a Verdict at Law.

BILL to prove a Will and perpetuate the Teſtimony of the Witneſſes. The Defendant pleaded himſelf a Purchaſor without Notice of any ſuch Will, and inſiſted, that unleſs there had been a Verdict in Affirmance of ſuch Will, (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law) the Plaintiff ought not to be admitted to examine his Witneſſes, thereby to hang a Cloud over a Purchaſor's Eſtate; and upon Debate the Court allow'd the Plea.

Foden verſus *Howlett.*

Caſe 351.
Eodem die.
In Court Lord Chancellor.

A Daughter of a Freeman marrying without her Father's Conſent loſes her Orphanage part, unleſs he is reconciled to her before his Death.

LORD Chancellor. If the Daughter of a Citizen of *London* marries in his Life-time againſt his Conſent, unleſs the Father be reconciled to her before his Death, ſhe ſhall not have her Orphanage Share of his Perſonal Eſtate; and it would be unreaſonable to take the Cuſtom to be otherwiſe.

Wall

Wall verſus *Thurborne.*

Caſe 352.
Eodem die.
In Curt Lord Chancellor.

SIR *George Crooke* having three Daughters only, by his Will directs, that his Lands ſhall deſcend and come amongſt his Daughters, in ſuch Shares and Proportions as his Wife by Deed in writing ſhould direct and appoint. The Wife makes an unequal Diſtribution, and having given little to the Plaintiff, ſhe brought her Bill, and inſiſted, that the giving the Wife ſuch Power by the Will was intended only to keep her Children in Obedience; and the Plaintiff having behaved her ſelf dutifully, ſhe ought to have an equal Share.

A. directs his Lands ſhall deſcend to his 3 Daughters, in ſuch Shares and Proportions as his Wife by Deed ſhall appoint.
She makes a very unequal Diſtribution.
Whether Equity will relieve againſt it.
Poſt Caſe 392.

To this the Defendant pleaded the Will, and that the Wife, in purſuance of ſuch Power, had by Deed executed appointed ſo much to one Daughter, and ſo much to the other; and tho' the Deed was with Power of Revocation, yet it was never actually revoked.

As to the Power of Revocation, the Caſe may be eaſed of that, for it was only an Authority in the Wife, and that being once executed, ſhe could not reſerve ſuch Power to herſelf. And as to the main Point, whether the Wife might make ſuch an unequal Diſtribution or not, the Court would not now determine upon the Plea, but ordered it ſhould ſtand for an Anſwer, with Liberty to except: But declared the Circumſtances muſt be very ſtrong, as ſomething of Bribery or Corruption, that would take away this Power that was given to the Wife by the expreſs Words of the Will.

A Perſon having only an Authority can't annex a Power of Revocation, when he executes it.

For the Plaintiff was cited the Caſe of *Cragrave* and *Perroſt*, where a Man having two Daughters, one by a former Wife, and another by his ſecond Wife, deviſed his Eſtate to his Wife to be diſtributed between his Daughters, as his Wife ſhould think fit; and ſhe gave *one thouſand Pounds*

Pounds to her own Daughter, and but 100*l.* to the other; and the Court there decreed an equal Diſtribution.

On the other Side was cited the Caſe of *Swetnam* and *Woolaſton*, where an Eſtate was deviſed to a Man to diſtribute the ſame amongſt his Nephews and Neices, as he ſhould think fit: and one of the Neices, to whom nothing had been appointed, brought a Bill, that ſhe might have an equal Share of the Eſtate, and was diſmiſſed.

Caſe 353.

27 Januar.

In Court Lord Chancellor.

Lady Bodmin verſus *Vande-bendy.*

A Term kept on foot to protect a Purchaſe. If Equity will remove it in favour of a Dowreſs, who has recovered at Law.

Ante Caſe 171.

THE Defendant for 4400*l.* purchaſed of the *Lord Bodmin* the Reverſion (after the Death of the *Lord Warwick*) of Lands of near 1000*l. per Ann.* and for Protection of the Eſtate, and to prevent the Plaintiff's Dower, the Defendant upon his Purchaſe took an Aſſignment of a Term for Years, which was veſted in Truſtees to ſecure the Payment of certain Annuities, and afterwards in truſt to attend the Inheritance; and likewiſe took an Aſſignment of an ancient Statute, that had been kept on foot for the Protection of the Eſtate.

The Plaintiff had recovered Dower at Law, but was prevented from taking out Execution by reaſon of this Term and Statute; to be relieved againſt which, and to be let into Poſſeſſion of her Thirds, was the end of the Plaintiff's Bill.

The Defendant inſiſted he was a Purchaſor, and that he ought to have the Benefit of this Term and Statute for the Protection of his Purchaſe.

For the Plaintiff it was inſiſted, That *Equitas ſequitur Legem*, and that Dower in the Eye of the Law was as much favoured as a Purchaſor; and therefore where a Tenant in Tail dies without Iſſue, whereby the Eſtate, which was in the

the Husband, is determined, yet the Dower continues; and that a Woman for her Dower comes not in the *poſt*, as has been objected, but it is a Continuance of the Husband's Eſtate: and tho' a difference has obtain'd and been allowed betwixt a Jointreſs that comes in by the Act of the Party, and a Woman that by operation of Law becomes intitled to Dower; and that the former ſhall have the Benefit of a Term limited to attend the Inheritance, and not the latter, yet in truth there was no ground in Reaſon for ſuch a Difference; for tho' a Jointure may be made in reſpect of a Portion, yet Marriage it ſelf is a ſufficient Conſideration, and ſo eſteemed in Law; *& fortior & æquior eſt diſpoſitio legis quam hominis.*

Secondly, The original Intent in creating this Term was only to ſecure the Payment of Annuities, and that particular Intent being ſatisfied, this Term ought not to be longer kept on Foot; and this Reaſon was enforced from the Judgment given in the Cauſe between *Hall* and *Dench*, where a Man having by his Will deviſed his Lands in Fee to *I. S.* and afterwards having occaſion for Monies mortgages the ſame Lands in Fee to *I. N.* it was decreed that this Mortgage was not an abſolute Revocation; but that the Deviſee ſhould have the Benefit of Redemption, the Mortgage being only for that particular Purpoſe to ſupply the Mortgagor's preſent Occaſions with Monies. And ſo in this Caſe, the particular Ends in raiſing this Term being anſwer'd, it ought not to be made uſe of to keep the Plaintiff out of her Dower: and they cited the Caſe of the *Attorney Gen.* and *Thruxton*, where it was adjudged, that the Inheritance eſcheating, tho' the King by eſcheate comes in the *poſt*, yet he ſhould have the Benefit of a Term limited to attend the Inheritance; and urged that in caſe there was a Term raiſed of Lands in *Gavell kind* to attend the Inheritance, that Equity would diſtribute this Term amongſt all the Heirs in *Gavell kind pro rata*; and it was further urged, that the Circumſtances of this Caſe were of great weight in Equity; the Defendant was a Purcha-

Ante Caſe 84. 133. 179.

Where Lands eſcheate to the King, he ſhall have the Benefit of a Term to attend the Inheritance.

ſor with Notice of the Plaintiff's Title to Dower, and that he took Advantage of the Lord *Bodmin*'s Extravagance, and that the Value in reſpect of the Conſideration paid was in it ſelf very exorbitant, *viz.* the Reverſion of 1000 *l. per Ann.* after the Death of the Lord *Warwick*, who died within a Year after the Purchaſe, for 4400 *l.* ſo that it might be reaſonably preſumed, that the Defendant had an Allowance made him in his Purchaſe in reſpect of the Plaintiff's Title to Dower; and it is a common Caſe in Equity, that where a Purchaſor has an Allowance in reſpect of an Incumbrance, this ſhall make the Incumbrance good, tho' it was before defective; and the Lady *Bodmin* here brought a great Portion, at leaſt 30000 *l.* and theſe Circumſtances make this Caſe much different from that of *Pheſant* and *Pheſant*, for there the Plaintiff had by the Decree of this Court her whole Portion reſtored to her, it having been lodged in the Chamber of *London*, and the Property not altered by her Husband; and there was therefore the leſs Reaſon to incline a Court of Equity to relieve her againſt the Term that prevented her Dower; and in that Caſe ſhe had not actually recovered Dower, as the Plaintiff here has done.

1 Ch. Rep. 181.

For the Defendant it was inſiſted, that this was a Caſe that muſt frequently happen, and yet there was no Precedent where a Plaintiff had been relieved in ſuch a Caſe; but on the contrary the Caſe of *Pheſant* and *Pheſant* was expreſs in Point, and adjudged that the Plaintiff ſhould not be relieved: And as to the Circumſtances of a great Portion brought by the Plaintiff, and that the Defendant had purchaſed at an under Value, by which they would difference this Caſe from that, it was anſwered, that thoſe were bare Suggeſtions, and not a word proved of it in the Cauſe, and therefore not to be regarded. But what was chiefly relied on by the Defendant's Council, was the Inconvenience that might enſue, ſhould Relief be given in this Caſe: That it would alter the courſe of Conveyancing, and overthrow many Purchaſes, it having always been

been looked upon as a good Security to a Purchaſor, and a ſufficient Protection to his Eſtate, where there was an antient Term kept on Foot; and frequently in ſuch Caſes to avoid Charges they never inſiſt on a Fine or common Recovery: And if ſuch a Term ſhall be ſet aſide for a Dowreſs, why not for any other Incumbrance?

The Court inclined to relieve the Plaintiff, and therefore in regard the equitable Circumſtances of a great Portion and the Purchaſe at an under Value were not in Proof, the *Lord Chancellor* referred it to a Maſter to examine, and to ſtate the Caſe to the Court.

Note, The Plaintiff's Bill was afterwards diſmiſſed, and upon an Appeal to the Houſe of *Lords* the Decree of Diſmiſſion was affirmed. *Vid. Caſes in Parliament* fo. 69.

Cox verſus *Foley.*

Caſe 354.

3 Februar. *At the Rolls.*

THE Bill was to be relieved touching two ſeveral Rents purchaſed by the Plaintiff of 3 *s.* and 2 *s. per Ann.* iſſuing out of Lands, the Bill ſuggeſting the Rents had been conſtantly paid Time out of Mind, but that they could not recover at Law, not knowing the Nature of the Rent, whether *Rent charge*, *Service* or Rent *Seck*, and the Boundaries of the Land being uncertain; ſo that they could not at Law declare with that Preciſeneſs as was required in an Avowry: And ſeveral Precedents being produced, where the Court had relieved in theſe Caſes, and, amongſt others, Sir *William Beverſham*'s Caſe, who had a Decree for a Rent of 1 *s.* 3 *d. per Ann.* the Court declared they would decree the Rent, if it had been conſtantly paid; but the Defendant deſiring the Matter might be tried at Law, an Iſſue was directed to try whether any and what Rent was iſſuing out of all or any the Lands in the Bill mentioned.

Bill in Equity lies for recovering antient Quit Rents, tho' very ſmall, as 2 *s.* or 3 *s. per Ann.* and if proved to be conſtantly paid, the Court will decree Payment, or will direct an Iſſue to try whether any, and what Rent is iſſuing out of all or any of the Lands in the Bill.

Uſher

Caſe 355.
Februar. 1685.
Sir *John Trevor* Maſter of the Rolls.

Uſher and *Prime* verſus *Ayleworth, Edmonds & al'.*

IN 1669, *Bromwell* and *Webb* took two Building Leaſes of Tofts of Ground in *London*, one from the Truſtees of St. *Bartholomew*'s Hoſpital, which was taken in *Kemſon*'s Name, and the other from the Truſtees of the Pariſh of St. *Michael Cornhill* in *Parſons*'s Name, upon which *Webb* and *Bromwell* built ſeveral Houſes, and therein *Bromwell* diſburſed conſiderably more than *Webb*. In 1675, by Indenture between *Kemſon*, *Webb*, and *Bromwell*, wherein reciting that *Kemſon*'s Name was uſed in the Leaſe from St. *Bartholomew*'s Hoſpital in Truſt for *Webb* and *Bromwell*, their Executors, *&c.* and that the Tofts were the proper Purchaſe of *Webb* and *Bromwell*, and the Houſes thereon were built at their Charges, *Kemſon* for 5 *s.* aſſigns that Leaſe to *Webb* and *Bromwell*, *habend'* to them, their Executors, *&c.* and they covenant to ſave *Kemſon* harmleſs from the Rent therein reſerved. The 23d *June*, 1669, *Parſons* aſſigns his Leaſe to them likewiſe.

Webb and *Bromwell* received the Rents and Profits during their Joint Lives; and in *June* 1678 *Bromwell* died, and made his Wife Executrix, who proved the Will. One *Hyban* upon a *Teſtat' fier' fac.* to the Sheriff of *Middleſex* ſeized the Houſes in Queſtion, which (19 *February* 1679) were ſold by the Sheriff to *Hybon*; and *Hybon* and *Bromwell*'s Executrix, for 240 *l.* paid by Plaintiff *Uſher*, aſſigned all their Intereſt in Law or Equity to the Plaintiff *Prime* in Truſt for *Uſher*.

Ten Days after *Bromwell*'s Death, *Webb* aſſigned St. *Bartholomew*'s Leaſe to *Francis Edmonds* for 800 *l.* Debt, which *Webb* owed him: Afterwards *Edmonds* died, and the Defendant *Edmonds* took Adminiſtration to him: *Webb* became a Bankrupt in *July* 1679, and the Commiſſioners

the 3d of *December* 1679, reciting *Kemſon*'s Leaſe and *Bromwell*'s Death, and that the Right ſurvived to *Webb*, aſſigned that Leaſe to the Defendant *Edmonds* for his Share of his Inteſtate's Debt of 800 *l.* owing by *Webb*; and *Edmonds* enjoyed till *Midſummer* 1684.

The Defendant *Aylesworth* ſwore by his Anſwer, that he went with one *Waile* (who depoſed ſo alſo) to *Bromwell*'s Executrix, to know if ſhe or any other claimed Title to the Premiſſes, and whether there was any Deed to prevent Survivorſhip; who ſaid ſhe claimed nothing therein, and that he might ſafely proceed in the Purchaſe; and thereupon (*June* 24, 1684) *Edmonds* for 410 *l.* really paid by Defendant *Aylesworth*, aſſigned *Hempſon*'s Leaſe to *Aylesworth*; and *Aylesworth* denied that he knew or heard of the Plaintiff's Title before his Purchaſe; and *Aylesworth* by his Anſwer confeſſed the having of *Kempſon*'s Aſſignment, and the Declaration of Truſt put therein, and confeſſed that the Leaſe to *Parſons* was not aſſigned to him by the Commiſſioners, nor by *Edmonds*, by any expreſs Words; yet conceived it did paſs; for that the Buildings were intermixed upon both Tofts of Ground, and that one could not be enjoyed without the other.

The Plaintiff and Defendant both of them proved their Mony paid; and the Queſtion in this Caſe was, whether the Plaintiff ſhould be relieved againſt the Title by Survivorſhip?

If two Joint Purchaſors pay an equal Share of the Purchaſe-Mony, this makes them Tenants in common in Equity.

For the Plaintiff it was inſiſted, that Survivorſhip was againſt Equity, and that by the Juſtice of this Court, if two joint Purchaſors pay Share and Share alike for a Purchaſe, and one dies, his Repreſentative ſhall be relieved againſt the Survivor for a Moiety of the Purchaſe; and that in the preſent Caſe there would be no doubt, but that if *Bromwell*'s Executor had ſued *Webb* for a Moiety, ſhe muſt have been relieved againſt him, and ſo muſt the Plaintiff alſo as her Aſſignee; and that if there was an Equity fixed upon the

Deeds by the Aſſignment and Declaration of *Kempſon* between the Joint Tenants to prevent Survivorſhip, as moſt certainly there was, the Defendant's Pretence of Ignorance of the Plaintiff's Title would not juſtify his Purchaſe againſt it; for that he purchaſing under *Kempſon*'s Aſſignment, muſt be ſubject to that Equity which did thereby ariſe againſt Survivorſhip; and that he did apprehend there was ſuch a Title lying out, appears by his Diſcourſe with *Bromwell*'s Executrix: And therefore he ſhould not have proceeded therein upon her ſaying ſhe claimed no Right, or that he might ſafely proceed; for that ſuch Diſcourſe was after her Aſſignment to the Plaintiff, and ſo would not turn to his Prejudice. Yet nevertheleſs the Defendant being a Purchaſor, tho' under theſe Circumſtances, the *Maſter* of the *Rolls* diſmiſſed the Bill without Coſts; and the rather, for that the Plaintiff did not bring the Bill till after the Defendant's Purchaſe, tho' the Plaintiff's Purchaſe was made two Years before.

Caſe 356.

John Huckſtep verſus *Dorothy Mathews* and *John Court*.

Februar. 1685.

Lord Chancellor.

Deviſe of Lands to Truſtees in Fee in Truſt to pay Debts and Legacies, and after theſe paid then to ſell; and if any of the Teſtator's Name would buy it, ſuch Perſon to have it for 200 *l.* leſs than the Value.

JOHN Huckſtep (whoſe Father and the Plaintiff were Brothers) in *December* 1685 made *John Mathews* and *Benjamin Court* Executors of his Will, and gave them thereby the Revenues of all his Lands till his Debts and Legacies were paid, and after Payment thereof gave the Lands to them and their Heirs, upon Condition that if any of the Name of *Huckſtep* would purchaſe them for his own Uſe, then his Will was that *Mathews* and *Court* ſhould ſell the ſame to him for 200 *l.* leſs than the reaſonable Value thereof.

One of Teſtator's Name brings a Bill for this Præmption; but delays bringing it until 25 Years after Teſtator's Death. Bill diſmiſſed.

The Executors proved the Will, and enjoyed jointly for 10 Years, and then *Court* died, and *Mathews* received the whole Rents, which with the Perſonal Eſtate were more

more than enough to pay the Debts and Legacies; and the Plaintiff being of the Name of *Huckſtep* brought his Bill, and prayed a Conveyance of the Lands for 200 *l.* leſs than they were worth to be ſold.

The Defendants demurred, for that the Will was made above *twenty five* Years ago, and it was uncertain to whom the Sale ought to be made, and *Mathews* and *Court* (who, if the ſame were to be ſold, were to ſell the ſame) are both dead; which Demurrer being heard before the *Lord Keeper North*, he ordered the Defendants ſhould anſwer the Bill, and ſaved the Benefit of the Demurrer to the hearing.

And now the Cauſe came on before the *Lord Chancellor*, and the Defendants by Anſwer inſiſted that *Court* being dead, *Mathews* after his Death had levied a Fine of the Premiſes, and made a Settlement thereof, under which the Defendants now claimed; and that there were above five Years paſt ſince that Fine was levied before the Plaintiff brought his Bill, tho' the Plaintiff lived always within a Mile of the Place, where the Teſtator died. And the *Lord Chancellor* conceived, that the Plaintiff's Bill being brought *twenty five* Years after the Teſtator's Death, what was prayed thereby was unreaſonable, and therefore diſmiſſed the Bill.

Suppoſe two Perſons named *Huckſtep* had at the ſame time claimed the Benefit of this Deviſe, which ſhould have it?

Thomas Butcher verſus *Stapely* and *Richard Butcher.*

Caſe 357. 10 Februar. *Lord Chancellor.*

A Parol-agreement for a Purchaſe and Poſſeſſion delivered, decreed to be

THE Defendant *Butcher* being ſeized of the Lands in Queſtion, which he had mortgaged to one *Colſtock*

performed against a subsequent Purchaſor with Notice, who had a Conveyance, and paid his Money.

for 400 *l.* agreed with the Plaintiff to ſell the ſame to him for 700 *l.* A ſhort Note was drawn up of the Agreement (but not ſigned by either Party) as follows: *December 9th*, 1682, *Richard Butcher* for 740 *l.* does bargain and ſell unto *Tho. Butcher* all thoſe Lands, *&c.* the Plaintiff to have them from *Lady-day* next, and then the Monies to be paid; the Plaintiff to have the Hogg Pound, and Dung, and the Defendant to pay all Taxes, *&c.* and is not to cut any Trees, nor to put any Cattle on the Premiſes, and is to have the Corn in the Barn, *&c.* and to avoid it ſo ſoon as he can: The Lands are in Mortgage to *Colſtock* for 4000 *l.* and the Plaintiff is to pay for the Writings. Soon after this Agreement the Plaintiff puts in his Cattle and makes Incroachment on the Defendant *Butcher*'s other Lands; thereupon the Defendant to prevent Differences deſires the Plaintiff to repeal the Bargain, which he refuſing, the Defendant told him he ſhould not have the Bargain, and adviſed him not to procure any Monies to pay for it, and drove the Plaintiff's Cattle off the Ground, and ſoon after ſold the Lands to the Defendant *Stapely* for 740 *l.* and the 3 *February*, 1682, ſealed Articles for that Purpoſe, and a Bond of 1000 *l.* to perform the ſame. The 26 *March*, 1683, the Plaintiff tendered his Purchaſe-mony and Writings to ſeal, which the Defendant refus'd, and the 28*th* of the ſame Month *Stapely* paid *Butcher* 240 *l.* and took a Conveyance of the Eſtate free from Incumbrances, except a Mortgage; and in *June* after paid off the Mortgage, and took an Aſſignment of it to a Friend of his own.

The Bill was to have the Bargain and Agreement between the Plaintiff and Defendant *Butcher* decreed, and charged *Stapely* with Notice of that Agreement before his Purchaſe, which *Stapely* and *Butcher* denied by Anſwer; nor was there any direct Proof of Notice, ſave that ſome Neighbours in Diſcourſe did ſay, they had heard the Defendant *Butcher* had ſold the Eſtate to the Plaintiff.

For

For the Defendant *Stapely* it was inſiſted, that there was no ſufficient Proof of Notice of the Plaintiff's Agreement, and that if there was Notice, yet the Agreement was not perfect nor binding by the Act againſt *Frauds* and *Perjuries*, it not being ſigned.

The *Lord Chancellor* declared, that in as much as Poſſeſſion was delivered according to the Agreement, he took the Bargain to be executed, and that *Stapely* had Notice of it, and that it was a Contrivance between the Defendants to avoid the Bargain; and therefore decreed the Defendant *Stapely*'s Bargain to be ſet aſide, and that *Stapely* ſhould execute a Conveyance to the Plaintiff upon Payment of 700 *l.* and Intereſt, and the Defendant *Stapely* to procure a Conveyance from his Truſtee the Aſſignee of the Mortgage.

Edward Allen verſus *Henry Arme.*

Caſe 358.
Februar. 1685.
Lord Chancellor.

A voluntary Surrender, made by a Man in his Sickneſs, good againſt his Wife and Children, who claimed under a ſubſequent Surrender made upon his Marriage after Recovery of that Sickneſs.

THE Plaintiff *Allen* being a Servant to the Defendant's Grandmother, married one of her Daughters, who brought him a Portion of 600 *l.* with part of which he purchaſed the Copyhold Lands in Queſtion, which were ſurrendered to the Uſe of the Plaintiff and his Wife, and the Heirs of their two Bodies, the Remainder to himſelf in Fee. The Wife ſoon after died without Iſſue; and the Plaintiff, with reſpect to her Memory, and in kindneſs to the Defendant her Nephew, did voluntarily ſurrender the Lands to the Uſe of himſelf for Life, with Remainder to the Defendant in Fee; and the Defendant was admitted to the Remainder in Fee, and paid 5 *l.* Fine. The Plaintiff afterwards married again, and his Bill was to be relieved againſt this Surrender, as obtained by Surprize and without Conſideration.

The Cauſe was at Iſſue, but no Surprize proved; the Bill abated by the Death of the Plaintiff and Defendant both;

and the Plaintiff's Wife, in behalf of herſelf and her Son by him, brought her Bill, in the nature of a Bill of Revivor (ſuggeſting a Settlement on her Marriage of the Cophyhold Lands upon her and her Iſſue) againſt the Defendant's Widow, who claimed by Surrender from her Husband.

And upon the Hearing (no Surprize being proved) it was inſiſted for the Plaintiff, that the Surrender was made (as indeed it was) by the Plaintiff's Husband in the time of his Sickneſs, and therefore it muſt be intended by him not to bind, in caſe he recovered of that Sickneſs, it being meerly voluntary, and that his Intentions appeared ſo by his having after his Recovery ſettled the ſame before his Marriage on the Plaintiff his ſecond Wife and their Iſſue, who were to be taken to be Purchaſors, and ought therefore to be relieved againſt that voluntary Surrender.

But the *Lord Chancellor* declared, he ſaw no Equity in the Caſe, nor could he infer any Intention by any Circumſtances in it contrary to the Surrender, and therefore diſmiſſed the Bill, there not appearing any Fraud or Truſt in the Caſe.

Caſe 359.
19 Februar.
At the Rolls.

A. purchaſes in the Name of *B.* and pays the Purchaſe-mony. *B* claims the Eſtate, there being no Declaration of Truſt. *A.* may be admitted to read Proofs, that he paid the Purchaſe-mony, but then thoſe

Gaſcoigne verſus *Thwing & al'.*

THE Bill was, that Sir *Thomas Gaſcoigne* in *October* 1678 purchaſed a great Manor-houſe and about *four* Acres of Land in *Com' Ebor'*, and took the Conveyance in the Name of one *Vavaſor*, who had aſſigned to the Defendant *Thwing*; and it was ſuggeſted, that the Eſtate was bought with the Plaintiff's Mony, and was upon Truſt, that one *Eliz. Thwing* deceaſed ſhould enjoy it for her Life, and then in Truſt for the Plaintiff and his Heirs, who by the Bill prayed the Eſtate might be conveyed to him.

The

The Defendant by Anſwer denied he knew it was bought with the Plaintiff's Mony; but believed it was bought with the proper Mony of the ſaid *Eliz. Thwing*, and that the Conveyance was in Truſt for her and her Heirs; and he claimed it as Heir to her, and inſiſted on the Statute of *Frauds* and *Perjuries*, there being no Declaration in Writing of any Truſt for the Plaintiff.

Proofs muſt be very clear to make it a Truſt ariſing by Implication of Law.

The Chief Point was, whether when a Man purchaſes Land with his own Mony, and takes the Conveyance in another Man's Name, this is ſuch a reſulting Truſt by Implication of Law, as is ſaved by the Statute, and needs no Declaration of Truſt.

And after long Debate, whether the Plaintiff ſhould be admitted to read, to prove the Mony was his, the Proofs were read; and they amounting only to what had paſſed in Diſcourſes, and been owned by the Defendant, and the Proofs being doubtful, the *Maſter* of the *Rolls* diſmiſſed the Plaintiff's Bill, becauſe the Proofs were not ſufficient whereon to ground a Decree; and ſaid, there was ſome Secret in the Cauſe, which he did not fully apprehend, and was not made clear upon the Proofs. Now the truth of the Fact was, that this great Houſe was bought with a Deſign to make a Nunnery of it, and the ſaid *Eliz. Thwing* was to be the Lady *Abbeſs*; and that Project failing, the Defendant ſet up for himſelf.

Aſh verſus *Rogle* and the *Dean* and *Chapter* of St. *Paul's*.

Caſe 360.
Lord Chancellor.
Maſter of the Rolls.
Eodem die.

THE Bill was brought by a Remainder-Man after an Eſtate Tail ſpent, to be relieved againſt an erroneous Recovery of a Copyhold Eſtate in a Court *Baron* ſuffered above *thirty* years ago; and the Relief ſought was, that the Dean and Chapter, who were Lords of the Manor, might

Bill brought by a Remainder-Man in Fee, of a Copy hold expectant on an Eſtate Tail which was

ſpent, to be relieved againſt an erroneous common Recovery in the Lord's Court.

Praying that the Lord may be decreed to ſuffer Plaintiff to bring a *Plaint* in the Lord's Court in nature of a Writ of Error to reverſe this Recovery, or that this Court would relieve on the Merits The Defendant demurred, and the Demurrer was allowed.

might be decreed to ſuffer the Plaintiff to bring a *Plaint* in the nature of a Writ of Error or falſe Judgemnt, in their Court *Baron*; or elſe that he might be relieved upon the Merits of the Cauſe by the Decree of this Court.

The Eſtate had been enjoyed under the Recovery ever ſince, tho' the Eſtate Tail was ſpent many Years ago. The Defendant *Rogle*, who claimed the Eſtate under the Recovery, demurred; For that it would be of dangerous Conſequence to all Perſons, who claimed under Recoveries of Copyhold Eſtates, to draw the ſame in Queſtion in this manner: for that through the Ignorance of Stewards of Copyhold Courts, it frequently happens, that all the legal Requiſites to a common Recovery of Freehold Lands were not obſerved in Recoveries of Copyhold Eſtates; and yet the barring of Copyhold Eſtates by Recoveries in ſuch Courts having obtained in many Manors, it would ſhake many of them, if upon Niceties in Form they ſhould be impeach'd: and inſiſted, there was no Precedent, that any Relief in ſuch Caſe was ever given in this Court; and that it was better to ſuffer a particular Miſchief in this Caſe, than by relieving it to make a Precedent of general Inconvenience to Owners of ſuch Eſtates.

The Dean and Chapter anſwered the Bill, and ſubmitted to do as the Court ſhould direct.

This Demurrer was firſt argued by learned Serjeants at Law and Council on both Sides ſolemnly, before the *Maſter* of the *Rolls*, who allowed the Demurrer; and afterwards being re-argued before the *Lord Chancellor*, he was of the ſame Opinion, and confirmed the *Maſter* of the *Rolls*'s Order; both of them ſeverally declaring, it would be of dangerous Conſequence, and contrary to Equity, to give any Relief in ſuch a Caſe: And yet the Errors aſſigned by the Bill in the Recovery were ſuch, as would have been groſs Errors in a Recovery in a Freehold Eſtate: and the *Lord Chancellor* ſaid, if there had been an Error in any Adverſary

Pro-

Proceedings in the Lord's Court, this Court would have ordered the Lord to proceed and examine it. You may try the Common-Law Courts, whether they will grant you a *Mandamus:* You ſhall have no Aid from this Court.

Bellaſis verſus *Benſon.*

Caſe 361.

27 Februar.

In Court, Lord Chancellor.

A Settlement of a Jointure actually made is an Evidence that all Parol Agreements before the Marriage were reſolved into that.

THE Bill was to be relieved touching the Plaintiff's Jointure, which the Bill charges was by Parol Agreement made on the Marriage agreed to be 400 *l. per Ann.* The Defendants plead, that after all Treaties and Agreements touching the Marriage-Settlement, a Jointure was actually ſettled and accepted, and the Marriage thereupon had, 18 Years ſince.

Lord Chancellor. The Jointure-Deed is an Evidence, that all the Precedent Treaties and Agreements were reſolved into that; but ordered the Defendants to Anſwer, and ſave the Benefit of the Plea to the Hearing.

Bright verſus *Woodward.*

Caſe 362.

Eodem die.

After a Suit againſt an Executor in this Court, he ſhall not be allowed Payments made voluntarily without Suit.

A Commiſſioner may be a Witneſs, but he muſt be firſt examined.

ON Exceptions to a Maſter's Report, *Lord Chancellor* was of Opinion, that after a Suit commenced here, an Executor ſhall not be allowed any Payments made voluntarily without Suit.

A Commiſſioner may be a Witneſs, but then he ought to be examined before any other Witneſs be examined.

Case 363. 26 Februar. *Lord Chancellor* Jefferies. *Lord Chief Juſtice* Jones. *Lord Chief Baron* Mountague.

Sir *Robert Sawyer* Kt. his Majeſty's *Attorney General*, on the Behalf of his Majeſty, } Plaintiff.

Edward Vernon Eſq; *Rupert Brown* and *Samuel Boheme*, } Defendants.

A Patent of Lands granted by the Crown ſet aſide by Bill in Equity, as unduly got. *Ante Caſe* 278.

THE Information ſet forth, that his Majeſty was ſeized in Fee, as Parcel of the Dutchy of *Lancaſter*, of the Honour of *Tudbury* in Com' *Derby*, *Stafford*, *Leiceſter*, *Nottingham* and *Warwick*, and of the Manor of *Tudbury*, the Forreſt of *Needwood*, the Offices of High Steward of the Honour of *Tudbury*, Conſtable of the Caſtle and Lieutenant of the Forreſt of *Needwood*, and Bayliff of the new Liberty, and Bayliff of the Caſtle and Manor of *Tudbury*, and High Steward of the Lordſhip and Manor of the *High Peake* and *Mirkerſworth*, the Office of Steward of *Newcaſtle Under-line*, lately granted to *William Leviſon Gower* Eſq; and of all thoſe Lands, Tenements, and Hereditaments, Parcel of the Demeaſne Lands of the ſaid Caſtle and Manor of *Tudbury* demiſed by his late Majeſty to *Michael Andrews*, and ſince by his now Majeſty to *Mary Blagg*, and divers other Lands, Privileges, *&c.* All which Premiſſes are Parcel of the Dutchy of *Lancaſter*, and are one Year with another 20000 *l. per Ann.* and his Majeſty ought accordingly to enjoy the ſame without Interruption, and to receive the Rents and Profits after the Expiration of the Leaſe granted of ſome Part thereof, and is alſo entitled and ought ro have the Benefit of all the Timber and Wood on the Premiſſes, which amounts to above 30000 *l.* and no Waſte or other Prejudice to the Diſinheriſon of his Majeſty ought to be done.

That the Defendants by Combination to deprive and prejudice his Majeſty in his Right in the Premiſſes, and to

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commit

commit Waſte therein, have lately entered on the Premiſſes, and began to cut down the Timber, and give out they will cut down all or the greateſt Part thereof, as alſo the *Hollywood* and *Underwood*, to the apparent Wrong of his Majeſty, pretending ſome Title by Deſcent or Conveyance from ſome of the King's Anceſtors, or that the ſame or greateſt Part thereof is duly granted unto them out of the Crown by his now Majeſty; whereas if they have any ſuch Grant the ſame was obtained by unuſual Means, and by Surprize, and ought not to be binding to his Majeſty, he being not duly apprized thereof. That about *September* 1683, the Defendants proceeded in a clandeſtine Manner to deceive his Majeſty, by making a colourable Propoſal for paying ſome inconſiderable Sum far ſhort of the real Value, and the getting in the Intereſt of ſome Grounds at *Sheirneſs* for his Majeſty, and diſcharging the Arrears due from his Majeſty for the ſame, which would amount to above 4 or 500 *l.* and yet no Mony has been paid to his Majeſty; and the Defendants endeavoured to have the Ground at *Sheirneſs* eſtimated at 300 *l.*

That in *October* following, the Defendants petitioned his Majeſty for the ſaid Grant, and a Reference to Sir *Thomas Chichley* Chancellor of the Dutchy, and a Report, was haſtily obtained from him in the ſame Month; and about the 19th of *November* following a Warrant was Signed for paſſing a Grant of the Premiſſes, and about two Days after a Grant was obtained under the Dutchy Seal, albeit all Endeavours were uſed to ſtop the Grant by his Majeſty's expreſs Commands, and by the Order of the Lords of the Treaſury on the 19th of *November*, and particular Application was made to the Chancellor of the Dutchy, but in vain, he denying he knew of any ſuch Grant; nor could it be known, till a Particular was found at a Scrivener's Shop about a Month after: Which Proceedings are contrary to the Courſe that hath always been, and ought to be obſerved in paſſing Grants of Inheritance under the Dutchy Seal; for there ought to have been firſt

a Warrant of the Auditor to make a true Particular to the Surveyors, who return an Eſtimate, and thereupon and not before a Warrant is granted by his Majeſty, and then the Clerk draws up a Grant for the King's Attorney of the Dutchy's Peruſal, who upon his approving thereof Signs the Bill with a Docquet, which afterwards being Signed by his Majeſty, paſſes the Seal of the Office; but by the Defendants haſty and unuſual Proceedings, there is no ſuch Grant yet regiſtred with the Clerk, nor Inrolled with the Auditor, nor any Footſteps of the Proceedings to be ſeen in the ſaid Office. That his Majeſty is deceived, not only to his Diſinheriſon, but to the apparent Prejudice of the Crown; and the ſaid Honours, Manors and Forreſts being of ſo great Extents and large Privileges and Royalties, and Multitudes of the Nobility, Gentry, and Freeholders, Copyholders, and others having Dependance there, and being thereby furniſhed with all Neceſſaries for Profit and Pleaſure, they are moſt proper to be preſerved in the Crown.

That the Defendants obtained the ſaid Grant by untrue Particulars, the Eſtates in ſuch Particulars being ſet down of leſs Value by ſome 1000 *l.* by the Year than the ſame are really worth, and the Wood and Timber not valued, tho' worth above 30000 *l.* and the quantity of Acres repreſented leſs by ſome Thouſands than they are, and ſeveral great Privileges and profitable Matters having no Value at all ſet on them, as appears by a Particular lately returned to his Majeſty by his Surveyor-General, whereby the Premiſſes are eſtimated at above 60000 *l.* nor is there any conſiderable Rent reſerved: For all which Cauſes and other Imperfections the ſaid Grant ought not to deprive his Majeſty of the Poſſeſſion and Right thereto, nor ought any of the Timber to be cut down by Vertue thereof, but ſuch Grant ought to be delivered up and Cancelled; and therefore it was prayed by the ſaid Information, that the Defendants may ſet forth what Propoſals were made to his Majeſty for obtaining the ſaid Grant, by whoſe Intereſt procured, what Reference was made thereupon, and whether

whether any Report was made, by whom, and how long after the Reference, when the Warrant was Signed by his Majeſty, and the Grant paſſed the Seal, and whether any Enquiry was made after it from his Majeſty before it was Sealed, and what Anſwer was given him, whether any Report was made by the Auditor or Surveyor General, or why omitted, and where were the Particulars ſigned; whether it is not the Uſage of the Dutchy to have all Grants of Inheritance paſs, as before is ſuggeſted, and why the ſaid Grant paſſed without obſerving that Courſe; for whoſe Benefit the ſaid Grant was made, and for what Conſiderations, and the Value of the Premiſes when the ſaid Grant was paſſed, and of the Timber and Wood on the ſame; That the Defendants Proceedings in committing Waſte might be ſtaid, and that the ſaid Grant might be Decreed to be delivered up and cancelled, and ſuch further Relief had as ſhould be meet.

The Defendant *Vernon* pleaded his Patent, and that he was a Purchaſor; which being over-ruled, he Anſwered and inſiſted on his Title; and by Anſwer ſet forth, that he believed the late King was ſeized in Fee, in right of his Dutchy of *Lancaſter* (*inter al'*) of the Honor of *Tudbury* and Forreſt of *Needwood* and other the Particulars hereafter mentioned to be granted to Mr. *Brown* and *Boheme*, tho' not of ſuch great Value as in the Bill. That the Defendant having ſeveral Leaſes of Parcel thereof, for long Terms at a conſiderable yearly Rent, as alſo Offices and Commands within the Forreſt and Honor, and having expended great Sums in building and Repairs and otherwiſe, and the King's Rents having been increaſed on taking ſome of the Leaſes, and the Reverſions of ſome of the Lands therein having been granted to others, and being informed Endeavours were uſed to obtain the Reverſion in Fee of the Lands in Leaſe and all the reſt in the Information with the Rents thereon, the Defendant was induced to draw up a Petition for the King's granting the Premiſes to

ſuch as the Defendant ſhould nominate; That he having acquainted the Duke of *Ormond* with his Intentions, and the Duke (as he believes and doubts not but to prove) adviſed with the Attorney General therein, and obtained the favour to make the King acquainted therewith, the Duke being privy to what the Defendant had done and ſuffered for the Service of the late King's Royal Father and himſelf, as alſo for that the Duke had an Intereſt in the Premiſes, of which the Grant was ſought, being Steward of the Honor and Conſtable of the Caſtle of *Tudbury* and Lieutenant of the Forreſt (*inter al'*) which are held for the Lives of the Duke and the Earls of *Arran* and *Oſſory*, and a Leaſe of the Scite of the Caſtle for about 90 Years yet in being.

That he attended the Earl of *Sunderland*, one of the Secretaries of State, with a Petition to the King in the name of *Rupert Brown*, the Defendant's Nephew (whoſe Name he made uſe of to prevent a Merger of his Leaſe) with the Propoſal annext (*viz.*) That the King would be pleaſed to grant to the Defendant the Inheritance of the Honor of *Tudbury* and Forreſt of *Needwood*, with the Lands thereto belonging, Parcel of the Dutchy, purſuant to the Propoſal annext (*viz.*) to pay to the King 7000*l.* in Mony, to reſerve the old Rents and to pay to the King as much as would amount by Increaſe of Rent and Deduction of Fees to 70*l. per Ann.* To convey to the King the Lands whereon the Fort of *Sheirneſs* was built, with a Releaſe of all Demands by reaſon thereof, and to keep for his Majeſty's Service 1000 Deer for ever clear of all Charges, *prout* Petition and Propoſal 29 of *September*.

That the Earl of *Sunderland* ſigned an Order of Reference to the *Chancellor* of the Dutchy (*viz.*) That his Majeſty was graciouſly pleaſed to refer the Petition and Propoſal to Mr. *Chancellor* of the Dutchy to conſider of it, and report what might be fit to be done therein for the King's Service and

and the Petitioner's Gratification, which his Majeſty was diſpoſed to, *prout* Order.

That the *Chancellor* having informed himſelf by Surveys and otherwiſe (tho' what his Methods therein were, the Defendant knows not) and reported a ſatisfactory Account thereof, the King ſigned a Warrant authorizing the *Chancellor* to paſs a Grant of the Premiſes, in the ſame Words with the Grant hereafter mentioned.

That by Indenture dated the *twentieth* of *November* 1683, duly executed and inrolled between his Majeſty of the one Part and the Defendant on the other Part, reciting that *Godfrey Meynell* for 400*l.* had granted to the Defendant and his Heirs all thoſe 23 Acres of freſh and 17 Acres of ſalt Marſh in the Iſland of *Shippy*, whereon the Fort of *Sheirneſs* was erected, and all his Eſtate and Intereſt therein; The Defendant granted and releaſed the ſame and all his Intereſt to the King, his Heirs and Succeſſors, and all Monies whatſoever which were due or owing to or could anywiſe be demanded by the ſaid *Meynell* and Defendant or either of them, the Defendant having Power from *Meynell* in that behalf. *Prout* Deed.

That in Conſideration thereof and of 7000*l.* *bona fidé* paid by the Defendants or ſome of them into the Receipt of the Dutchy, and for other Conſiderations, the King by his Warrant under his Sign Manual in the Words in the Patent hereafter mentioned, and in Purſuance thereof by his Letters Patents under the Dutchy Seal executed by Livery and Seiſin, did give and grant *prout Letters Patents.*

Knows not whether by the Uſage of the Dutchy Court Grants of Inheritance ought to paſs in ſuch Manner and Form as by the Bill is ſet forth, but believes the Grant was duly paſſed, and is effectual in Law, and whether or no the Grant was inrolled is not material. Inſiſts

that the Grant ought not to be impeached on Pretence of an Over-value, or the Defendant drawn under an Examination in this Court touching the ſame; For he avers, That in the Life-time of the late King *Charles* the *Firſt* he did faithfully and with the hazard of his Life ſerve him in the late War in Arms, and was by the *Uſurper* long impriſoned in the *Tower*, and thereby and otherwiſe ſuffered much both in his Eſtate and Perſon. That altho' the Patent was taken in the Name of *Brown* to prevent a Merger of the Defendant's Leaſes, and alſo in the Name of *Boheme* to prevent *Brown*'s Wife from Claiming Dower, yet their Names were purely made Uſe of at the Defendant's Nomination and in Truſt for him and his Heirs, and was granted in Favour of this Defendant at the Inſtance of his Friends and with reſpect to his Sufferings, as well as for the Conſideration of the Conveyance of the Lands in the Iſle of *Sheppy* and the 7000*l.* which the Defendant avers was really paid for the King's Uſe to *Nathaniel Curſon* Deputy Recorder of the Dutchy, *prout* his Receipt.

That in as much as the Grant is of his late Majeſty's ſpecial Grace, as alſo for the Conſiderations before mentioned and in the Grant expreſſed, the Defendant inſiſted, the Patent ought not to be impeached under pretence of Surprize, or want of Conſideration, or any of the Suggeſtions in the Bill, for which there is no Ground in the Patent, eſpecially ſince it is a Grant of the Honor, Lands, *&c.* in the Bill, which ought not to be impeached by an *Engliſh* Bill in this Court, being no Court of Record; and is adviſed, it would be in derogation of his Majeſty's Grants and of dangerous Conſequence to all his Subjects, ſuch eſpecially as claim any Eſtate of Inheritance by Letters Patent, if they ſhould be drawn under Queſtion on ſuch Pretences as in the Information; eſpecially ſince the Suit wants a Precedent: and if theſe be Grounds to avoid the King's Grant, they are ſuch as may lie againſt all that are of the King's favour, and other Conſiderations: nor can any Averment

verrment lye againſt ſuch Grant, where his Majeſty's Grace and Favour is an Ingredient in it.

That the Patent is matter of Record, and good in Law, and that the Common Law ought to determine the Validity thereof; nor ought, nor can a Patent, if a matter of Record, be vacated or cancelled by a Decree or *Engliſh* Bill; and the rather for that ſuch Conſiderations as aforeſaid have been paid and ſatisfied, beſides the great Charges in paſſing it; and the Defendant is intituled to the Protection of the Court, as a Purchaſor, and the Validity of the Patent ought not to be impeached here, whereby the Defendant may loſe the 7000 *l.* and *Shierneſs* Lands.

That as to the Particular mentioned to have been returned to the King by his Surveyor General, the Defendant inſiſts that the ſame being *ex poſt facto*, no uſe ought to be made thereof to Impeach the Grant; nor is the ſame true, but ſet on foot, not for the King's Advantage, but by ſome who would Impeach the Defendant's Grant, in expectation of a Grant thereof to themſelves, moſt of the Particulars thereof being valued at exceſſive Rates, and many thereof being in Jointure to *Queen Dowager* with a power of filling up Leaſes for 31 Years at any time during her Life; and as appears by the Particular, the Surveyor has taken many things by hearſay and by the relation of others, who would Impeach the Grant, and great Values are there put upon Reverſions after long Leaſes on inconſiderable Offices, ſuch as were never valued in a Purchaſe; as the Offices of Steward, Bailiff and the like, the Profits whereof will ſcarce anſwer the Trouble of any that are capable to be truſted therewith: and the Surveyor has computed the Soil of the Forreſt at 27200 *l.* upon a ſuppoſition that the Forreſt may be incloſed: Whereas there are ſeveral Perſons of Quality and Worth, that have Charters and claim Eſtovers and right of Common through-

out the Forreſt. And whereas in the late Wars there was an Ordinance for incloſing it, yet the ſame could not be effected without an armed Force, much leſs is it probable that this Defendant ſhould compaſs it. Neither is the Surveyor's Valuation of the Timber leſs extravagant, being computed at 30000 *l.* and he is miſtaken in Quantity and Value, as may appear by two Surveys taken in the late times with more exactneſs, the one in 1650, which values the Wood and Timber at 13591 *l.* 18 *s.* the other in 1658, where they are valued at 12284 *l.* 18 *s.* 2 *d.* out of which Eſtovers were to be allowed *prout* Surveys: And afterwards Timber to the Value of 3098 *l.* 9 *s.* were cut down and ſold by the Uſurpers; and the Wood in the Forreſt was certified in 1662 and 1663 by the late Lord *Seymour* and the Officers of the Forreſt to be worth about 12000 *l.* and believes they really thought it worth no more; and much of the Timber has been ſince cut down and carried away by ſeveral Grants from the King, and many of the beſt Trees have been picked and culled out, for ſuch as claim Eſtovers; the Earl of *Devonſhire* claiming (*int' al'*) 3 Cart Load of Wood from the Exaltation till the Invention of the holy Croſs once a Year, and as much Timber as was neceſſary for building and repairing old Houſes and Tenements formerly belonging to the Prior and Convent, and the tenth Penny and part of all Timber ſold within the Chaſe, and other Tythes and Perquiſites, *prout* the Earl's Anſwer in the Dutchy.

That conſidering the Matters before, as alſo that the Country there abounds with Timber, and no navigable River near, much of the Timber to be preſerved for Eſtovers, and Holleys, and Underwoods, and other Woods are to be preſerved for the Deer, which the Defendants are obliged to keep; The Surveyor's Report will appear to be grounded on Miſtakes, and made up of extravagant Computations, and imaginary Values.

That

That the Honour of *Tudbury* was formerly of a great Extent and Dependancies, yet it is not now of ſuch Conſideration to the Crown, as the Bill ſurmizes, being diſmembered and reduced to a narrow Compaſs: the moſt conſiderable Manors and Lands formerly held of it being transferr'd and held of others of the King's Manors, and particularly *6 Car'* I. (*int al'*) the Inheritance of the Manor of *Braſeington*, *Bouteſhall*, *Sherrald* Park and Lands in *Tudbury* were granted to *Charles Harbord* Eſq; *& al'* in Conſideration of 2207 *l.* in Mony and a Debt of 2350 *l.* and of the King's Grace, which are of the Value of 3000 *l. per Ann.* (as informed) and are held of the Honour of *Enfeild.*

Denies the late King was ſurprized or deceived in the paſſing of the Grant, or that any falſe Particulars were delivered to the King by the Defendant or any other to his Knowledge, or that the King was miſinformed (unleſs by the Particulars of the Surveyors General in the Bill) of the Quantity or Value of the Premiſes, but believes the contrary. Denies he knows or believes that there was any Order or Direction by the late King or Lords of the Treaſury for the hindering or ſtopping of the Grant, or that any Order or Meſſage for that Purpoſe was ſent or delivered to the *Chancellor* of the Dutchy on the 19th of *November* 1683, or before the paſſing thereof: but if ſuch had been, the *Chancellor* of the Dutchy (as believes) would have obeyed it; and believes it altogether untrue, and without ground; for that (as informed) the King for a conſiderable time after the Grant was paſſed expreſſed himſelf to be well ſatisfied therewith, and declared he deſigned the 7000 *l.* Conſideration for a particular Uſe (as informed and believes) and has heard that a Month after the Grant paſſed there was a Paper left with the *Chancellor*'s Secretary (*viz.*) Let no Grant paſs of *Caſtlehay Agardſley* little Park and *Hanbury* Park, the Caſtle of *Tudbury*, and the Raingerſhip of *Needwood* Forreſt, till notice to my Lord *Dartmouth*, his Lady, or Mr. *Richard Grahme.*

Denies

Denies any Endeavours were uſed by him or any to his Knowledge to have the *Sheirneſs* Lands valued at 3000 *l.* or a greater Sum than the real Value; the Conſideration paid by the Defendant for the ſame appearing in the Grant, tho' he believes he bought the ſame at a great Under-value.

Believes after the Grant paſſed, a Particular of the things thereby granted, as well as of the Defendant's Leaſes, and Eſtates therein, might be left by the Defendant *Brown* at a Scrivener's in *London* to procure 10000 *l.* thereon for the Defendant; but the ſame was not thought a ſufficient Security; and the Defendant being thereby diſappointed, and the Defendant *Brown* having advanced and become bound with the Defendant for ſeveral Sums, it was agreed between them, that *Brown* ſhould become a Purchaſor of a full Moiety of the Premiſes for 7000 *l.* (which was the 7000 *l.* paid to the late King) and ſhould diſcharge the Defendant from all Engagements that he ſtood bound in for raiſing thereof, and that *Brown* ſhould lend the Defendant 3300 *l.* on a Mortgage of the other Moiety; and thereupon this Defendant, the Defendants *Brown* and *Boheme*, by good Aſſurance well executed by way of Leaſe and Releaſe, conveyed the Premiſes to Mr. *Serjeant Birch* and his Heirs; as to one Moiety thereof, to the Uſe of *Brown* and his Heirs, and as to the other Moiety to the Uſe of *Birch* and his Heirs, in truſt firſt by Sale or Profits to raiſe and pay the 3300 *l.* with Intereſt to *Brown*, afterwards for Payment of the Defendant's Debts, and afterwards in truſt for the Defendant and his Heirs.

Denies he has committed any Waſte or felled any Wood ſince the Grant, tho' he ſays by ſeveral Leaſes to him made of part of the Premiſſes, there are Boots granted to him, and Timber for new Buildings and Repairs.

The Anſwer of the Defendants Brown *and* Boheme.

Rupert Brown believes the late King was ſeized, in right of the Dutchy, of the Honours, Manors, *&c.* in Bill; and the Defendant *Vernon* informed him, he had a Promiſe from the King of a Grant thereof, in Conſideration of a Conveyance of *Sheirneſs* Lands, and of 7000 *l.* That the Grant being agreed to be taken in the Name of the Defendant *Brown* and the Defendant *Boheme* his Servant, the Defendant *Brown* at the Defendant *Vernon*'s Requeſt advanced and paid the Monies. That the King in Conſideration thereof, and for other Conſiderations in the Patent mentioned, by Letters-Patents under the Dutchy Seal, whereon Livery was executed, under the Rents and Covenants therein, granted to the Defendants *Brown* and *Boheme* and their Heirs the Premiſſes in the Words therein *prout*; that afterwards, at the deſire of the Defendant *Vernon*, the Defendant *Brown* lent at Intereſt to him the Sum of 3000 *l.* which, with 300 *l.* before due to *Brown*, together with Intereſt for the ſame was agreed to be ſecured on part of the Premiſſes, which Part was for that Purpoſe conveyed to *Edward Birch* Eſq; named by the Defendants *Brown* and *Vernon*; the Eſtate in Law of the reſt of the Premiſſes being then ſettled to the Uſe of *Brown* and his Heirs, in conſideration of the 7000 *l.* which was paid with the Defendant's proper Monies to Mr. *Curſon* Receiver or Deputy Receiver of the Dutchy, *prout* Receit.

That for the 7000 *l.* and 3300 *l.* the Defendant is a real Purchaſor of the Premiſſes; beſides the Defendant hath been put to great Charges for drawing of Writings, Advice of Council and other matters relating to the Premiſſes.

Both ſay, that as to the Ways or Means of obtaining or paſſing of the Grant (other than the paying the 7000 *l.* and conveying *Sheirneſs* Lands) they are ignorant, being

tranſacted by the Defendant *Vernon*, to whom the King intended a conſiderable Reward. *Brown* inſiſts that the Grant is good in Law, and ought not to be impeached on the Suggeſtions in the Bill in a Court of Equity; and cannot give any Account of the Propoſals or Proceedings in obtaining or paſſing the Grant, being managed by the Defendant *Vernon*, and the Defendant concerning himſelf no further than the paying of the 7000 *l.* and ſeeing the Conveyance of *Sheirneſs* executed. Conceives the Court will be very tender to examine any of the Methods or Means, how ſuch Grant came to be paſſed, when it hath received the Allowance of the proper Officer. That the Defendant hath paid in part of the Rent reſerved on the Patent to *Curſon*, for the King's Uſe. *6 l.* 11 *s.* 9*d.*

And the Defendant *Boheme* ſays, that he being a Servant to the Defendant *Brown* is a Stranger to the Premiſſes, further than that his Name was made uſe of in the Patent, and diſclaims any Intereſt in the Premiſſes.

The Proofs as to the Values were very various; and the Surveyor General's Survey, which made it amount to 60000 *l.* was reduced to one half, even by the Attorney General's own Proofs. *Vernon* proved the Surveys and all the Matters in his Anſwer fully; ſo that upon weighing the Proofs on both ſides, the extremity of the full Value did not amount to 20000 *l.* *Vernon* proved his Majeſty's Order of Reference 29 *September* 1683, from the Lord *Sunderland* principal Secretary of State, to the *Chancellor* of the Dutchy, and the 19 *November* 1683 the Warrant ſigned *Charles Rex*, and counterſigned by the *Chancellor* of the Dutchy; and the 20 *Novembris* 1683 *Vernon*'s Conveyance of the Land at *Sheirneſs* to the King inrolled: and the 21 *Novembris* 1683 the Patent paſſed the Dutchy Seal. The Attorney of the Dutchy proved the Methods of paſſing Grants, but that when by the King's immediate Command the Lands are aſcertained, the Eſtate limited, and Rent fixt, (as it was here) Grants have

have paſſed by Privy Seal or Signet. The Duke of *Ormond* proved a Letter writ by himſelf, and ſent by *Vernon* 29 *Auguſt* 1683, to the Attorney General, ſignifying, that he had left *Vernon*'s Propoſals with the Lord *Rocheſter* the firſt Commiſſioner of the Treaſury, and that the Attorney's Anſwer was, ſuch Grant might be legally paſſed; and that the King declared to the Duke he intended a Kindneſs to *Vernon* by the Grant, and was well ſatisfied with it, and did not expreſs his diſpleaſure, till the Country Gentlemen petitioned againſt it; and he and the Earl of *Ardglaſs* and others fully proved *Vernon*'s Service and Sufferings for the Crown, his being a Colonel in the time of the Rebellion, his ſupplying the King with 2000*l.* in his Exile, and other ſignal Services, which the King often owned, and his being many Years impriſoned under *Cromwell* in the *Tower*, and in danger of being put to death in endeavouring the King's Reſtoration.

For the King it was argued, that an *Engliſh* Bill was the proper Remedy in this Caſe, for that no *Scire fac'* would lye, it not being a Record of this Court; and if it would, yet a *Scire fac'* would not reach this Fraud, it not appearing within the Body of the Grant; and Equity here did but follow the Law; many Things even at the common Law being ſuch Surprizes, as ſhould avoid Letters Patents in a *Scire fac'*; and if a Man had been ſo cunning, as to avoid thoſe particular Badges of Fraud and Surprize that came within the reach of the common Law, and there was a Fraud and Surprize in the preſent Caſe, tho' compaſſed in another Method, it was fitting the King ſhould not be left without Relief in ſuch a Caſe; if he was, he would be in a worſe Condition than a Subject, who ſhould avoid a Conveyance, nay a Fine, when obtained *mala fide*: and it was not fitting, that it ſhould be left in the Power of the King's Officers by their Connivance to put his Majeſty without Relief in the caſe of a Fraud and Surprize: and tho' there was no Precedent of any ſuch Suit, yet all Precedents had a Beginning; and there

was

was ſcarce any Precedent of ſuch a Fraud and Surprize: And as the Remedy was proper, ſo in this Caſe there was ſufficient Ground for a Decree, there being all the Badges of Fraud and Surprize imaginable. *Firſt*, In the paſſing of the Grant, no Warrant to the Auditor to make out Particulars; no Warrant to the Surveyor to return an Eſtimate; no Bill with a Docquet ſigned by the Attorney; none of the uſual Methods obſerved, but only a Warrant under the *Sign Manual* for paſſing the Grant in Queſtion to the *Chancellor*, and Counterſigned by him; which is to make a Warrant to himſelf, a thing never before heard of: And tho' a Patent may paſs by immediate Warrant under the Privy Seal or Signet, yet this is in Effect no Warrant; being only under the Sign Manual, and no Seal to it, neither Privy Seal nor Signet: And then the haſty Proceeding is remarkable; this Warrant was ſigned but the 29th of *November*, and the Patent paſſed the Dutchy Seal the 31ſt of *November*, tho' it would take a Week's time to ingroſs it: And here the Petition, Propoſal, the *Chancellor*'s Report, and Warrant for the Grant, are all of the Hand-writing of *Wooley*, the Defendant *Vernon*'s Man; and the Over-value in this Caſe was exceſſive, and the Conſideration of the Defendant's Services and Sufferings were not to be regarded in the Caſe, the Patent being but in common Form, and no particular Notice taken of any Services or Sufferings; no Gratuity or Bounty being intended by the *King*, but it was a bare Purchaſe, and the Patent recites the Conſideration, and that the Dependancies were great, and not fitting to be ſevered from the Crown; many Noblemen hold of this Honour: And the Precedent won't be of ſuch dangerous Conſequence as is pretended, for there muſt be a recent Proſecution in the Caſe of a Surprize; and here it was immediately; but an Acquieſcence for any conſiderable time would have amounted to a Confirmation.

For the Defendant it was ſaid, that there are two Queſtions, *firſt*, whether the Grant be avoidable by *Engliſh* Bill? *Secondly*, if avoidable, whether there be ſufficient Ground to avoid the Patent in queſtion? *Firſt*,

Firſt, There is no Precedent of any ſuch Suit ever brought into this Court, and it is *Littleton*'s Rule *What never was, never ought to be:* And it is in itſelf repugnant, that Letters Patents being Matter of Record ſhould be deſtroyed by *Engliſh* Bill; the *Engliſh* Side of the Court of *Chancery* being no Court of Record: And beſides, the Law having ſet the Bounds what Matters ſhall be reckoned ſufficient to avoid the King's Grant, and what not, and provided Remedies for ſuch Caſes, Equity ought not to go beyond the Law in this Caſe; and the rather, for that Relief in Equity ought to be mutual: Now if the Patent had been defective, or had not paſſed ſo much Land as was intended, yet this Court would never have relieved the Subject, as in *Doddington*'s Caſe, (*Co.* 2. Report) where even in the Body of the Patent it appeared more Land was intended to have paſſed, yet there being a defective Deſcription of it, Judgment was given for the ſecond Patentee againſt the firſt, who was a Purchaſor; and it was never heard that the Patentee came into this Court for Relief, tho' the Lawyers in my Lord *Cook*'s Time were Men of great Learning and Abilities, and knew well how to adviſe their Clients, had they looked upon it as a Caſe proper for this Court to have intermeddled with: But in former Ages it was not thought that Letters Patents, being Matter of Record, could be altered or ſet aſide by *Engliſh* Bill; but Acts of Reſumption were then thought neceſſary; but this indeed is a more eaſy and expeditious Way, if it is to be admitted.

An Over-value was never yet thought a ſufficient Ground to repeal a Patent in a *Scire fac'*; for Kings are preſumed to be bountiful; and tho' all that a Subject can do is but what his Duty obliges him to, yet there are in this as ſtrong Motives to incline his Majeſty to be bountiful to the Defendant, as can be in any Caſe; for here the Defendant ſold 400 *l. per Ann.* and ſpent it in raiſing and maintaining a Regiment for his Majeſty's Service, and was all along in Arms from the firſt ſetting up the Stand-

ard at *Nottingham*, and was inſtrumental in his late Majeſty's Eſcape from *Briſtol*; ſuffered two Years Impriſonment in the *Tower*, preſented his Majeſty with 2000 *l.* in his Exile, *&c.* and the Duke of *Ormond* proves, that the King deſigned him a Gratuity and Reward by the Grant in queſtion. It is a Matter much in derogation of his Majeſty's Grants, that they ſhould be impeached on the Pretences in the Information, and of dangerous Conſequence to all Patentees, eſpecially if the ſucceeding King ſhall avoid his Predeceſſor's Grant on pretence of an Over-value; nor is that Miſchief anſwered, in ſaying there muſt be a recent Proſecution; for the Law ſays *nullum tempus occurrit Regi*; and the Law has no more aſcertained what ſhall be called a recent Proſecution, and what not, than it has what ſhall be reckoned an Over-value to avoid a Grant, and what not.

As to the Objection that this Patent did not paſs in the ordinary and regular Method, and had not its due Progreſſion, it was anſwered, that this muſt be taken to be well paſſed, and to be a good Grant at Law, otherwiſe there would be no need of an *Engliſh* Bill, but might be avoided by *Scire fac'*; for the Patent may be removed by a *Certiorari* into this Court, and then a *Scire facias* will lie: And the Methods of paſſing Grants in the *Dutchy* are various, and the Attorney of the *Dutchy* in his Depoſition ſays, many Grants have paſſed by immediate Warrant under the Privy Seal or Signet; and they took it, that a Warrant under the Sign Manual was as valid as if it had been under the Signet or Privy Seal: And in this Caſe, Expedition and Secrecy, which are objected to us as an Evidence of a Surprize, were but neceſſary, it appearing in the Cauſe that the Defendant had a powerful Competitor, the Lord *Dartmouth* endeavouring to obtain a Grant of the things in queſtion: And the Objection, that the Warrant for the Patent and other Papers were wrote by the Defendant's Servant, is of no great weight, it being common for Patentees to make uſe of their own Council; and Pa-

tents are many times drawn by them, and ingroſſed by their Clerks; and if the proper Officers are anſwered their Fees, there is no great hurt in that; ſince that is not a Reaſon ſufficient to avoid the Patent.

As to the Over-value, the Proof is various; there have been no leſs than three former Surveys, which in all other Caſes have been the Foundation from which they have taken their Meaſures in the *Dutchy*; and if our Witneſſes are to be credited, there is not really any conſiderable Over-value in the Caſe; and the Surveyor's Certificate here is *ex poſt facto*, and that not by the Surveyor of the *Dutchy*, who is the proper Officer in this Caſe: And had there been a Particular certified by the proper Officer precedent to the Grant, yet that ſhould not now ſtand in Competition, or joſtle with the Patent.

Lord Chief Baron Mountague ſaid, he took it that the Allegations in the Information were fully proved, and that the King's Evidence was much ſtronger then the Defendant's; that the Propoſal mentioned nothing of Services, but ſeemed to imply an adequate Conſideration; and the Over-value being proved, he took that to be a falſe Suggeſtion: And the Over-value in ſome meaſure appeared from the Defendant's Tenaciouſneſs. That the Warrant was of an unuſual and unheard-of Nature; being directed to the *Chancellor* of the *Dutchy*, and Counterſigned by himſelf; no Privy Seal or Signet to it; here were no Particulars from the *Auditor*, no Certificate from the Surveyor, and the Patent paſſed not gradually but *per ſaltum*; and he looked upon the Over-value to have been the occaſion of the Secrecy, Huddle and Haſte that had been uſed in paſſing this Grant: And as to the Objection, that there was no Precedent of any ſuch Suit brought into this Court; he ſaid, this Court creates Precedents. It is not long ſince Bills to foreclose Redemptions were firſt brought in uſe, and the Court muſt find out new ways to obviate the Miſchiefs of the Age, for *Creſcit in Orbe dolus*; and he

he took it that no *Scire fac'* would lie in this Caſe, the Deceit not appearing in the Body of the Grant; and therefore thought his *Lordſhip* might juſtly decree a Reconveyance, and that the Patent ſhould be delivered up and cancelled: And he ſuppoſed Care would be taken that the Conſideration ſhould be reſtored.

Lord Chief Juſtice Jones ſaid, The Pleadings in the Cauſe are very long, and the Proofs voluminous, he would not therefore (having but an old decayed Memory, and at this time wanting the uſe of Hands which might in ſome meaſure ſupply that Defect) take upon him to repeat all the Circumſtances of the Caſe, but would in a few Words deliver his Opinion.

It is objected, that the Subject Matter of this Suit is not proper by an *Engliſh* Bill; that is not the proper Method, they ſay, for avoiding Letters Patents. I take it, that a *Scire fac'* will not lie in this Caſe, or if it would, yet the Deceit appears not in the Body of the Patent; and therefore a *Scire fac'* will not reach it. The Value is not mentioned in the Patent, and ſhall there be no way then where the King is deceived for his Majeſty to be relieved? That would be to put him in a worſe Condition than a Subject. But there is no Precedent, they ſay; he was ſorry that Colonel *Vernon*, an honeſt Gentleman, and of known Loyalty, ſhould be the Occaſion of making a Precedent of this nature; but there was a time when all Precedents began. Had the Patent been intended a Gift or Gratuity only to the Defendant *Vernon* for his Services, there no Fraud or Surprize would have been collected from the Over-value; but there being Money to be paid for the Grant, and that being the Conſideration which was regarded, as well as the Defendant's Services and Sufferings, he therefore thought the exceſſive Over-value in this Caſe argued a plain Surprize, if not a Fraud. But it is objected, What ſhall be ſaid to be ſuch an Over-value as will avoid a Patent, and what not? My Brother *Pemberton*, in

arguing

arguing for the Defendant, admitted that an exceſſive and outragious Value might do it; and the Court is to judge what is exceſſive and outragious, and what not. He thought the Plaintiff's Proofs as to the Values were much ſtronger and more full and exact than the Defendant's; but yet had there been no unfair Practice or Artifice in the Caſe, he ſhould have moved my *Lord Chancellor* that an Iſſue at Law might have been directed, for aſcertaining the Value; but as this Caſe was a Patent huddled up in haſte by an unuſual ſort of Warrant, all Offices paſt by, no Money at the time paid, but only a Note given to the *Chancellor* of the *Dutchy*, who was not the proper Officer to receive the Monies; and here before the Grant was perfected, (that is to ſay, before Livery) there was a kind of a Prohibition, and Mr. *Curſon* was deſired not to receive the Monies. Therefore upon the whole Matter he thought his Lordſhip might very well decree the Patent to be delivered up and cancelled, and order a Reconveyance to be made.

Lord Chancellor thanked their Lordſhips for their Aſſiſtance in this Cauſe, which was a Cauſe of very great Conſequence, and was glad to find their Lordſhips concurred ſo entirely in Opinion with him; for beſides the Apprehenſion he had of his own Inability, he had formerly heard this Matter at the Council Board, and knew many things of his own Knowledge that might have had ſome Influence on his Judgment; but now he was fully convinced that he ought to decree the Patent to be delivered up. That Colonel *Vernon* has been very Loyal, and that his Services and Sufferings for the Crown have been conſiderable, muſt be admitted; it is proved by Perſons of great Quality, that were concerned with him; but after all that is but every Subject's Duty; and by the way he ſaid, he muſt take notice that Colonel *Vernon* had before this time taſted of the King's Bounty both in *England* and in *Ireland*; that this Patent was not deſigned or intended to be a Bounty or Reward to Colonel *Vernon*, but was intended

a Purchaſe, and nothing elſe: for here, as ſoon as ever the late King was informed of the Over-value, he gave Directions for ſetting aſide this Patent, which anſwer'd the Objection of a ſucceeding King's avoiding his Predeceſſor's Grants, for here the Proſecution was begun in the time of his late Majeſty. There is nothing of Services ſuggeſted in the Petition, nor any thing of it mentioned in the Patent, and the Words *ex mero motu* are only words of Courſe, *&c.*

The firſt Queſtion then is, whether this Court upon an *Engliſh* Bill may in any Caſe decree Letters Patents to be delivered up and cancelled: and he was clear of Opinion, that had the Patent paſſed ever ſo regularly, that yet this Court might have decreed it to be delivered up. Fraudulent Contracts and Bargains are properly relieveable here; the Precedents are common. In the Caſe of *Coleby* and *Smith*, a Fine, Conveyance, Releaſe, Articles, and ſeveral other Deeds, made at a conſiderable diſtance of time one after another, were all ſet aſide. But it is asked, how can a matter of Record be vacated by *Engliſh* Bill? Does not this Court every Day decree Satisfaction to be acknowledged on Judgments and the like? And he ſaid, that the Patent in queſtion was not matter of Record, for the Eſtate paſſed by Livery, and therefore he thought a *Scire fac'* would not lie in this Caſe, becauſe it is no Record; for had the Patent been removed by a *Scire fac'* into this Court, that would not have made the Patent a Record, which was no Record before: but in Caſe a *Scire fac'* would have lain, he thought there was ſufficient ground to avoid theſe Letters Patents upon a *Scire fac'*, becauſe there was no ſufficient Warrant for the paſſing of the Grant; there being neither Privy Seal, nor Signet to it; and to ſay no worſe, the *Chancellor* of the *Dutchy* was at leaſt ſurprized in the paſſing of this Grant, and had gone beyond all manner of Method. A Report ought to have come back to the Secretary's Office, from which the Warrant was made; here the Warrant for paſſing the Grant is counter-

counterſigned by the *Chancellor* himſelf, who is to paſs it; the Report and the Warrant for the Grant are both wrote by *Vernon*'s Man; and here is a Warrant to *Tench* to make out Particulars on the ſame Day that the Report bears date; and the Warrant is but the 19th of *November* and the Patent is ingroſſed and paſſed the 21ſt of *November*; in ſo ſhort a time, that it was not poſſible to be done after the Warrant paſſed; but all things were prepared and in a readineſs for a Surprize; and here before Livery, and before the Money came to *Curſon*'s Hands, there is a Countermand and a Caveat entered; and tho' from the Lord *Dartmouth*, yet that is not material: and the King, had he known how the matter ſtood (but that was kept ſecret) might have countermanded the Livery; and then the Patent had been invalid. And here the *Chancellor* is Secretary, is Treaſurer, counterſigns a Warrant to himſelf, is every thing: What Authority had he to receive the Money? they might as well have paid it to any body they had met; and before it came to *Curſon*'s Hands, he is told the King was diſpleaſed with the Grant, and deſired to forbear receiving of it: ſo that in truth here is no Mony paid at all. And then the Over-value is exceſſive in this Caſe: It is fully proved, (and he ſaid, he knew it) that Mr. *Harbord* offered to give as much as the Particular comes to, and ſo did other Gentlemen of the Country; and any one that knows Mr. *Harbord* will eaſily believe, that he would not knowingly buy an ill Bargain, or ſacrifice ſo many thouſand Pounds out of any Peake to Colonel *Vernon:* and the greatneſs of Extent and Dependancies muſt be made an Ingredient in this Caſe. He ſaid, he could wiſh the Crown had not parted with ſo many Flowers, as it hath already done, and then he was perſwaded there would not have been ſo many Rebellions as there have been: and tho' Colonel *Vernon* was an honeſt Gentleman and of good Quality, the Honour of *Tutbury* is of that vaſt Extent, and ſo many Noblemen hold of it, that it is not fitting for a Perſon of his Degree; and therefore decreed the Patent to be delivered up and cancelled, and that Colonel *Vernon* ſhould procure his

his Truſtees to reconvey; and ſaid, Care would be taken that the Money ſhould be repaid: But that Matter would be moſt proper upon a Petition to the King.

But *Note*, here was no Direction for conveying back of *Sheirneſs* to *Vernon*, nor any Satisfaction to be made for it. And afterwards by a Bill exhibited by *Brown* againſt *Vernon* and *Curſon* for the 7000 *l.* *Vernon*, who refuſed to give any Obedience to the Decree, dying before he Anſwered that Bill, *Brown* ſet up an Adminiſtrator to him, who put in an Anſwer, and *Brown* obtained a Decree againſt *Curſon* for the 7000 *l.*

Dancer verſus *Evett.*

Caſe 364.
March, 1685.
Lord Chancellor.
Copyholder in Fee takes an Infranchiſement of his Copyhold in the Name of a Truſtee, and deviſes the Land to his younger Son, who ſells to *A.* The Heir at Law of the Copyholder recovers in Ejectment, and *A.* brings his Bill, and is Decreed to hold and enjoy againſt the Heir.

THE Caſe upon a Bill of Review was this. A Copyholder in Fee agreed with the Lord to Infranchiſe his Copyhold, and took the Conveyance from the Lord in the Name of a Truſtee, and then deviſed the ſame Lands to a younger Son, from whom the now Defendant purchaſed them. The now Plaintiff, who was Heir at Law of the Copyholder, recovered the Lands in Ejectment (as he might do upon his Anceſtor's Admittance) and thereupon the now Defendant brought his Bill againſt the Heir to be relieved in Equity, and inſiſted that the Eſtate purchaſed of the Lord was purely an Eſtate in Equity according to the Caſe of *Smith* and *Murrin*, reported amongſt the Lord *Coke's* Copyhold Caſes (*fo.* 24. *b.*) and that the diſpoſition of the Fee to the Purchaſor was a diſpoſition of the whole Eſtate that the Copyholder had either in Law or Equity: and the Lord *Chancellor Nottingham*, who heard the Cauſe, was of that Opinion, and Decreed that the Purchaſor ſhould hold and enjoy againſt the Heir of the Copyholder, who now brought his Bill of Review to reverſe the Decree, and inſiſted that his Anceſtor did not alien the Copyhold.

The Defendant, who was Plaintiff in the Original Cauſe, pleaded the Decree, and inſiſted by way of Demurrer,

murrer, there was no Error in it; and the *Lord Chancellor* was of that Opinion, and allowed the Demurrer.

Parker versus *Turner.*

Case 364.
March, 1685.
Lord Chancellor
A. B. Tenant in Tail of a Copyhold, Remainder to himself in Fee, purchases the Freehold of the Lord, and then sells to *J. S.* and dies; and after 30 years Possession, the Son of *A. B.* sets up a Title as Issue in Tail. Purchasor decreed to hold against the Issue in Tail.
2 *Chanc.* 174.
Post Case 434.

A Person being Tenant in Tail Male of a Copyhold Estate, Remainder to himself in Fee, purchased the Freehold of the Copyhold from the Lord, and then for a full Value bargains and sells the whole Estate, which was quietly enjoyed under the Purchase 30 Years. The Tenant to the Purchasor being a Woman, and the Copyholder being dead, married his Son, who being thus got into Possession set up his Title as Issue in Tail: the Plaintiff, who claimed under the Purchasor, brought an Ejectment, and a special Verdict was found at Law; but before that was argued he brought his Bill here for a Decree to hold against the Issue in Tail, and the Defendant pleaded his Title.

The *Lord Chancellor* declared, he was of Opinion that the Purchasor of the Freehold should attract the other Estate, which was but at Will; however took time to consider of it, and afterwards did Decree it so accordingly, and that the Purchasor should enjoy against the Issue in Tail.

DE

Termino Paſchæ,

2 *Jacobi II.* 1686.

In Curia Cancellariæ.

Tallbott verſus *Braddell.*

Caſe 365.
26 Aprilis.
In Court, Lord Chancellor.
A in 1657 conveys to *B*, ſubject to Redemption on Payment of 380 *l.* in 1688, and Poſſeſſion is immediately delivered.
Redemption decreed and an Account of Profits, before the Day of Payment in the Proviſo.

THOSE under whom the Plaintiff claims, in the year 1657 conveyed the Eſtate in queſtion, being Part in Poſſeſſion and other Part leaſed out for Lives unto the Defendant and her Heirs, and this was in conſideration of 320 *l.* paid, and a Reſervation of 5 *s. per Ann.* Poſſeſſion is delivered immediately, but there is a Proviſo in the Deed that on Payment of 380 *l.* in the Year 1688, the Eſtate ſhould be redeemed or reconveyed. It appeared in the Cauſe that the Eſtate in Poſſeſſion at the time of the Conveyance was but 15 *l. per Ann.* that the 5 *s.* Rent had been always paid: but two old Lives happening to die within ſome few Years after the Conveyance, the Eſtate became 45 *l. per Ann.* and the Plaintiff's Bill was now to redeem.

This Cauſe had been heard by the *Lord Keeper North*, and a Redemption decreed with an Account of Profits, and the Maſter had reported the Defendant overpaid; and the Cauſe came now to be reheard.

It

It was inſiſted for the Plaintiff, that this was a ſpecial Bargain and Agreement of the Parties, that ought to be binding; and that the Eſtate was not redeemable till 88; and that then there ought to be no Account of Profits, but 380 *l.* ought to be paid for the Redemption.

Firſt, That the *lien* in a Mortgage ought to be equal; where one Side cannot foreclose, the other ought not to redeem: and in this Caſe the Plaintiff could not have foreclosed the Defendant till 88.

Secondly, That an Account of Profits was not reaſonable in this Caſe; *firſt*, becauſe there was a Contingency in the Caſe; as the Lives happened to die ſoon, ſo they might have lived long, and then the Defendant had loſt good part of his Intereſt; and *ſecondly*, it is uſual and common in *Welch* Mortgages to deliver the Poſſeſſion immediately, and to agree to ſet the Profits againſt the Intereſt; and ſuch Agreements have always been allowed good in this Court.

For the Defendant it was inſiſted, that this Court had always favoured Redemptions; and if the Court ſhould ſuffer Redemptions to be fettered by ſuch Clauſes, Scriveners would be inſerting them in every Mortgage, and by that means worm young Heirs out of their Eſtates: and it was ſaid, that the Rule where one Side can't redeem, the other can't foreclose, does not hold in all Caſes: for if I lend 100 *l.* upon a Mortgage with a Proviſo to redeem on Payment of 112 *l.* at the end of 2 Years, there one Side can't foreclose till the end of 2 Years; but if the Mortgagor comes at the end of the firſt Year, and offers to pay the 112 *l.* he ſhall be admitted to the Redemption.

The Court inclined that the Plaintiff ſhould redeem, but propoſed, that whereas the Maſter had reported the Defendant to be 60 *l.* overpaid, and the Defendant had ſince that received two Years Profits, the Plaintiff ſhould wave

the Benefit of the Account, and the Defendant forthwith deliver Poſſeſſion; and gave the Defendant a Week's time to conſider of this Propoſition.

Caſe 366.

Oglander verſus *Baſton.*

27 Aprilis.

In Court, Lord Chancellor.

A Sum of Money awarded to the Husband, which he is intitled to in right of his Wife, will go to his Executor, and will not ſurvive to the Wife.

THE Plaintiff being intitled to the Surplus of the perſonal Eſtate of *I. S.* as Reſiduary Legatee, and a Difference ariſing between the Plaintiff's Husband and the Executor touching the *quantum* of this *reſiduum*, it was referred to Arbitration, and an Award is made that the Executor of *I. S.* ſhould pay 1500*l.* to the Plaintiff's Husband; but before any thing further was done, the Husband dies, and this Bill was now brought by the Wife againſt the Executor of her Husband, and alſo againſt the Executor of *I. S.* and the ſole Queſtion was, who had the right to this 1500*l.* whether the Executor of the Husband, or whether it ſhould ſurvive to the Wife.

Lord Chancellor. The Award is a ſort of Judgment, and the Arbitrator having awarded that the 1500*l.* ſhould be paid to the Husband, *That* has changed the Property, and veſted it in the Husband.

The Caſe of *Norden* and *Levet* was cited, where the Husband had a Term in Right of his Wife, and only took a Covenant for further Aſſurance; and it was adjudged, that altered the Property. On the other Side it was ſaid, that if the Husband grants a Rent-charge out of a Leaſe, which he has in the Right of his Wife, that does not change the Property: but if the Husband makes a Demiſe of the Term it ſelf, tho' but for a fortnight, that will alter the Property. *Per Cur.* If there be a Bond-debt due to the Wife, the Husband may ſue alone without joining his Wife; but in caſe the Wife was joined in the Action, and Judgment is recovered, the Judgment will ſurvive to the Wife; but not being joined, the Intereſt

A Man may ſue alone without his Wife for a Debt due to her by Bond. But if he joins the Wife in the Action and recovers Judgment and dies, the Judgment will ſurvive to her.

2. does

does veſt by the Judgment in the Husband, and will go to his Executor.

Jauncy verſus *Scaley.*

Caſe 367.
29 Aprilis.
In Court, Lord Chancellor.

THE Plaintiff, as Adminiſtrator to *J. S.* who died at *Naples*, brought his Bill to have a Diſcovery of the Inteſtate's perſonal Eſtate. The Defendant pleaded, that the ſuppoſed Inteſtate had made a nuncupative Will in the Preſence of *nine* or more credible Witneſſes, and thereby made the Defendant Executor, and that he (the Defendant) had proved the Will according to the Cuſtom of the Country where the Teſtator died; and denied he had left any Eſtate, but what was at *Naples*.

A. died beyond Sea and made a nuncupative Will. *B.* took Adminiſtration here, and brought his Bill for a diſcovery of the ſuppoſed Inteſtate's Perſonal Eſtate. The Defendant pleaded the Will and that he was Executor, and that *A.* left no Aſſetts, but what were beyond Sea. Plea allowed.

The Court allowed the Plea, and ſaid the Teſtator having left no Eſtate in *England*, it was not neceſſary that the Will ſhould be proved here; no more, than if a Man died and left an Eſtate in *Scotland*.

A Will of a Perſonal Eſtate which lyes in a Foreign Country may be prov'd there, and need not be prov'd here.

Fowke verſus *Hunt.*

Caſe 368.

A Citizen of *London* dies leaving a Widow, and no Children, but has ſeveral Grand-Children living at the time of his Death; and the Queſtion was whether they were within the Cuſtom of the City of *London* or not. The *Lord Chancellor* took time to conſider of the Caſe; and having conſulted the *Recorder* and ſeveral of the *Aldermen*, this Day delivered his Opinion, that Grand-Children were not within the Cuſtom of the City of *London*.

Grand-Children not intitled to a Cuſtomary ſhare of a Freeman's Perſonal Eſtate by the Cuſtom of *London*.

Clobery verſus *Symonds.*

Caſe 369.
Eodem die.
Lord Chancellor.

THE Plaintiff's Bill was to redeem Lands, which in the Firſt Year of King *Charles* the *Firſt* were extended upon a Judgment for 400 *l.* the Plaintiff deriving his

Conuzee of a Judgment extends the Lands of the Conuzor upon an Elegit;

Conuzor grants over the Reverſion; the Grantee may bring a Bill to redeem the Conuzee, tho' at a great diſtance of time and tho' a former Bill for the ſame Purpoſe was diſmiſt.

Title under one, who Purchaſed theſe Lands from the Conuzor of this Judgment without notice. The Defendant claimed part of the Lands by Aſſignment under the Conuzee of the Judgment, and pleaded that ſo long ago as in the Year *J. S.* under whom the Plaintiff claims, brought his Bill in this Court to redeem: that the Cauſe was heard, and an Account directed to be taken by one of the Maſters of this Court, and it was ordered that the Plaintiff ſhould within 6 Months after the Report made pay the Money reported due, or in default thereof the Bill was to ſtand abſolutely diſmiſſed. That the Maſter made his report accordingly, and that *J. S.* did not pay the Money reported due within the time limited by the decretal Order; and thereupon the Bill was diſmiſſed: and that *J. S.* lived above 20 years afterwards, and never ſought any Redemption; and averred that the Profits of the Lands were not ſufficient to pay the Intereſt of the Mony reported due; and that ſince this Diſmiſſion he had purchaſed part of the Land for a valuable Conſideration, and demanded the Judgment of the Court, whether after this length of Time and Proceedings aforeſaid the Plaintiff ſhould be admitted to a Redemption.

The Court over-ruled the Plea, becauſe under the Extent the Defendant has at Law an Intereſt only *quouſque* he is ſatisfied; and the Diſmiſſion here will not give him a greater Eſtate; and it would be abſurd to deny a Redemption; for the Intereſt under the Extent was but a Chattel Intereſt, and the conſequence of denying a Redemption would be, that Lands of Inheritance ſhould not deſcend; but to the World's end go in a courſe of Adminiſtration.

Caſe 370.
Eodem die.

Smithier verſus *Lewis.*

In Court, Lord Chancellor.

Plaintiff having recovered Judgment at Law for 1400 *l.* a-

THE Plaintiff having obtained a Judgment againſt the Defendant on a Bond of 1400 *l.* Penalty for payment of 700 *l.* and Intereſt, brought his Bill, and ſetting forth this

this Judgment, complained, that the Defendant to defraud him of the benefit of it, had aſſigned his Eſtate to Truſtees, that he had lent 1200 *l.* to *Rowe* and *Green*, who were ſince become Bankrupts, in the name of one *Elton*, but that it was in Truſt for the Defendant *Lewis*, and therefore prayed a diſcovery of this Matter, and that the Plaintiff might come in under the Statute of Bankruptcy for this 1200 *l.* Debt, and that the Commiſſioners might not make any Diſtribution, till this Matter was determined.

gainſt *J. S.* brings a Bill charging that *J. S.* had convey'd his Eſtate to Truſtees and had lent 1000 *l.* to *A.* in *B*'s Name, and praying that this might be lyable to Plaintiff's Debt.

The Defendant demurred, for that he in his Life-time was not bound to diſcover his Perſonal Eſtate; and for that this Bill was in the nature of a Foreign Attachment, which the Practice of this Court did not admit or countenance.

Defendant demurrs, for that in his Life-time he was not bound to diſcover his Perſonal Eſtate, and Demurrer over-ruled.

See the next Caſe.

Per Cur'. Over-rule the Demurrer.

Angell verſus *Draper.*

Caſe 371.
Eodem die.
In Court, Lord Chancellor.

THE Bill was, that the Plaintiff had obtained Judgment againſt *J. S.* for 100 *l.* and that the Defendant upon pretence of a Debt due to himſelf, and to prevent the Plaintiff's having the benefit of his Judgment, had got Goods of *J. S.* of great Value into his hands, ſufficient to ſatisfy his Debt with a great Over-plus; and pray'd an Account and Diſcovery of theſe Goods.

A. obtains Judgment againſt *B.* and brings a Bill againſt *C.* for an Account and Diſcovery of Goods of *B.* which *C.* had got into his Hands.

The Defendant demurred, becauſe the Plaintiff had not alledged that he had ſued out Execution, and had actually taken out a *Fieri fac'*; for until he had ſo done, the Goods were not bound by the Judgment, nor the Plaintiff intitled to a Diſcovery or Account thereof. *Per Cur'*. Allow the Demurrer: the Plaintiff ought actually to have ſued out Execution before he had brought his Bill.

Defendant demurred, becauſe the Plaintiff had not alledged he had taken out Execution.

Demurrer allowed.

See the foregoing Caſe.

Burch

Caſe 372.
30 Aprilis.
In Court, Lord Chancellor.
An Attachment ſued out in the time of King *Charles* the *Second*, and executed three Days after the King's Demiſe, but before Notice of his Death, adjudged to be well executed, and the Proceedings thereon regular.

Burch verſus *Maypowder.*

THE Queſtion upon the Maſter's ſpecial Report was, whether an Attachment that was ſued out in the time of the late *King*, and was Executed at *Exeter* 3 Days after the *King*'s Demiſe, but before any Notice of the *King*'s Demiſe, was well executed or not.

The Objection taken to it was, that tho' the Execution of the Attachment before Notice of the *King*'s Demiſe was good, and would excuſe the Officer that did it; yet the Return of the *Cepi Corpus*, which was made after notice of the *King*'s Demiſe, was nought; and the Plaintiff having upon the *Cepi Coprus* returned got a Meſſenger and Proceeded for the Contempt, *that* was irregular.

But the Court, on reading the Caſe of *Crew* and *Vernon*, in *Cro. Car'* 97, and a Precedent in the Lord *Keeper North*'s time, betwixt *Vaughan* and *Bampfield*, was of Opinion, that the Attachment was well executed and alſo well returned, and that the Proceeding upon it ſince was good.

Caſe 373.
4 Maij.
In Court.
Action of Debt brought againſt an Heir upon the Bond of his Anceſtor, who pleads a falſe Plea and the Plaintiff has Verdict; the Defendant dyes before the Day in *Bank*, and deviſes his Lands to *J. S.* the Obligee brings a Bill againſt the Deviſee to be paid his Debt. Bill diſmiſſed.

Holley verſus *Weedon.*

ONE *Thomas Caſtle* became Bound to the Plaintiff for Payment of 100*l.* and Intereſt, and dies; and ſome Land, of which he was ſeized in Fee, deſcended to *Jane* his Daughter and Heir. *Jane* died, and the Land deſcended to *Robert*, her Uncle and Heir. The Plaintiff ſues out an *Original* againſt *Robert*, who pleaded a falſe Plea, and the Plaintiff had a Verdict at Law for Recovery of his Debt: but *Robert* died before the Day in *Bank*, having deviſed his Lands to the Defendant his Son.

The End of this Bill was to affect the Lands in the hands of the Defendant with this Debt recovered at Law, but

but rendered fruitleſs by the hand of God: And the Caſe of *Parker* and *Dee* was cited as a Precedent near this Caſe.

Lord Chancellor. Diſmiſs the Bill; there is no colour of Equity in the Caſe, unleſs you'll have it that *Robert* died maliciouſly before the Day in *Bank*, on purpoſe to defeat the Plaintiff of his Debt.

See St. 17 Car. 2. cap. 18. & 1 Jac. 2. cap 17. Alſo ſee St. 3 & 4 Wm. & Mar. cap 14.

DE
Term. S. Trinitatis,
2 *Jacobi II.* 1686.
In CURIA CANCELLARIÆ.

Case 374.

16 Junij.

In Court.

Post Case 405.

Lands are limited to the second Son in Fee, provided that if the eldeſt Son die without Iſſue the ſecond Son ſhould within ſix Months after ſuch Death of the eldeſt Son pay 1500*l.* to the Siſter; or in default thereof, the Lands ſhould go to the Siſter and her Heirs. The eldeſt Son dies without Iſſue. The Siſter dies within the ſix Months; her Heir, and not her Executor, ſhall have the Benefit of this Deviſe over.

Com' Winchelſea verſus *Wentworth. & al'.*

THE Lands in Queſtion were limited to *John* the ſecond Son; ſubject to a Proviſo that if his elder Brother ſhould die without Iſſue, *John* ſhould pay the Lady *Katherine* 1500*l.* within ſix Months after the Death of the elder Brother; or in default thereof, that the Land ſhould go to the Lady *Katherine* and her Heirs. The elder Brother dies without Iſſue, and within *three* Months afterwards, being before the time for Payment of the 1500*l.* the Lady *Katherine* died, and *John* refuſed to pay the 1500*l.*

The principal Queſtion was between the Heir and Executor of the Lady *Katherine*; *viz.* Whether this ſhould be taken as a real Eſtate and go to the Heir of the Lady *Katherine*, or be looked on as a perſonal Eſtate, and only a Security for Mony, ſhe dying before the time of Payment, and go to her Executor.

The *Lord Chancellor* directed a Caſe ſhould be ſtated by a Maſter for the Judgment of the Court.

In arguing of this Caſe, were cited the Caſe of *Pitcarne* and------, and *Wallis* and *Grimes*, where the Court had re-

relieved in like Caſes, againſt the Limitation over, on Payment of the Mony, tho' after the Day.

But the *Lord Chancellor* declared his Opinion, That the Court ought not to relieve in ſuch Caſes, for that is to deſtroy the known and common Difference between a Limitation and Condition.

Earl of Winchelſea verſus *Norcliff & al'.*

Caſe 375.
Eodem die.
In Court.

A Guardian to an Infant having a conſiderable Sum of Money in his Hands, that was raiſed out of the Infant's Eſtate, lays out 2500 *l.* in a Purchaſe taken in the Name of *I. S.* for the Benefit of the Infant, if, when he came of Age, he ſhould agree thereto, and allow the Truſtees that Money upon Account. The Infant dies under Age. *Poſt Caſe* 410.

The Queſtion was whether the Heir of the Infant ſhould have this Eſtate, or whether it ſhould be looked on as a Security for 2500 *l.* and go to the Executors or Adminiſtrators of the Infant? As Precedents for the Heir were cited the Caſes of *Palmer* and *Allicot*, and *Dennis* and *Badd*, where a Guardian buys in a Mortgage on the Infant's Eſtate, and takes an Aſſignment of it in the Names of Truſtees.

The Court inclined to the Heir, but referred this to be ſtated as a Caſe by the Maſter. And in this Caſe the Court held, that where a Perſon intitled to a Share of an Inteſtate's Eſtate dies before Diſtribution, and within the Year, there was an Intereſt veſted, and that his Share ſhould go to his Executor or Adminiſtrator.

In this Caſe alſo the Court was of Opinion, that where there is a Brother of the whole Blood to the Inteſtate, and *Vid. Poſt Caſe* 410.

a Sister of the half Blood, the Sister should have but half a Share.

But *note*, the Judgment in the Cases of *Smith* and *Tracy*, and *Stapleton* and *Sherrard*, and the constant Practice of the Court, has been otherwise.

Note, It has been since settled in the Case of *Crooke* and *Watts*, upon an Appeal to the House of *Lords*, that the half Blood should have a whole Share, *viz.* equal with those of the whole Blood.

Clyat versus *Batteson.*

Case 376.
30 Junij.

In Court.

Lands in Mortgage devised to *A* for life, remainder to *B* in Fee. *A* takes an Assignment of this Mortgage in a Trustee's name. *B* may compel *A* to contribute a third of the Mortgage in respect of his Estate for Life. Otherwise if the Tenant for Life is dead, and a Bill is brought against his Executor.

LANDS in Mortgage are devised to *A* for Life, Remainder to *B* and his Heirs. *A* enters and buys in the Mortgage, taking an Assignment in Trustees Names, and dies. *B* the Remainder-Man now preferrs his Bill against the Defendant, the Representative of *A*, to redeem the Mortgage; and his Council insisted, that he ought to pay but two thirds of what was due on the Mortgage, and the other third ought to be allowed by the Defendant, by reason that the Tenant for Life enjoyed the Profits during his Life.

Per Cur'. Had you come to redeem in the Life-time of the Tenant for Life, then he should have allowed a Proportion of the Money with respect to the Value of the respective Estates of the Tenant for Life and Remainder-Man; but he being now dead, and having enjoyed the Estate but one Year only, the Defendant must make an Allowance only for the time that *A* enjoyed the Estate.

D E

DE

Term. S. Michaelis,

2 *Jacobi II.* 1686.

In Curia Cancellariæ.

The Earl of *Kildare* verſus Sir *Morrice Euſtace & al'.*

Caſe 377.
8 Novembris.
In Court, Lord Chancellor.
2 Ch. Rep. 188.
Poſt Caſe 398. 399. 404. 411.
Bill lyes here to be relieved touching a Truſt of Lands in *Ireland*, Defendant being in *England*.

THE Plaintiff's Bill was to be relieved touching the Truſt of certain Lands in *Ireland*. The Defendants had appeared and anſwered the Bill, and had not any way objected to the Juriſdiction of this Court: But the Cauſe coming now to be heard, the *Lord Chancellor* objected, this Court could not hold Plea of Lands in *Ireland*.

For the Plaintiff it was urged, that he was proper for Relief in this Court by reaſon that both Plaintiff and Defendant were here in *England*, and that a Court of Equity does only *agere in perſonam*; its Proceedings are to reform the Conſcience of the Party, and if at any time a Court of Equity may be ſaid to *agere in rem*, it is only in the Caſe of *Sequeſtration*, which is for the Contempt of the Party; and that therefore the Defendant being ſerved with a *Subpæna* here, and living in *England*, this Court had proper Juriſdiction of the Cauſe, tho' the Land lyes in *Ireland*; and the rather, for that it was never yet preten-

ded that there was any local Action in Equity: and they instanced for Precedents the late Cases of the Lord *Arglasse* and *Muschamp*, and Lord *Arglasse* and *Pit*, and *Archer's* Case, and insisted that otherwise there would be a failure of Justice, for the Defendant living here could not be served with Process issuing out of the *Chancery* in *Ireland*.

Ante Case 70.
Ante fo. 239.

But the *Lord Chancellor* over-ruled the Plaintiff's Council, and said as to the Cases of the Lord *Arglasse*, the fraudulent Contracts were made here in *England*; and as to the present Case there would be no failure of Justice, for they might have a *Subpæna* out of this Court returnable in the *Chancery* of *Ireland*; as in his own Experience, in Cases between Master and Prentice in the City of *London*, he had known *Subpæna's* to have Issued out of this Court returnable in the *Mayor's* Court in *London* for Persons that lived out of the Jurisdiction; and therefore pronounced the Rule for the dismissing the Bill: but at the Importunity of the Plaintiff's Council gave them a Week's time to search for Precedents.

Case 380.

10 Novembris.

Lord Chancellor.

2 Ch. Rep. 29.

Elliot versus *Hele*.

Tenant in Tayl with power to make a Jointure, in consideration of Marriage, articles to make a Jointure, and dies without Issue and without making the Jointure: the Wife dies; and her Executrix brings a Bill for an Account of the Profits of the Lands Articled to be settled. Bill dismissed.

TENANT in Tayl with power to make a Jointure of Lands in the Counties of *A*, *B*, and *C*, remainder in Tayl to *J. S.* Marries and receives 3000 *l.* Portion with his Wife, and by Articles before his Marriage covenants to settle a Jointure, but dies before any Settlement was made; the Wife dies, and her Executrix brings the Bill to have an Account of the Profits of the Lands, which by the Articles were covenanted to be settled in Jointure, against the Remainder-Man, who had upon his Marriage settled those Lands upon his Wife and her Issue: but with Notice of the Power in the first Tenant in Tayl to make a Jointure.

The *Lord Chancellor* dismissed the Bill, there being no Equity for the Administratix of the first Jointress against the

the ſecond and her Iſſue, who was equally a Purchaſor with the firſt: And this Power being a general Power to make a Jointure, and not ſaid of what Lands in particular, was not ſuch a *Lien* upon the Lands as ſhould affect a Purchaſor, tho' the Power had been afterwards executed; much leſs where it was not executed at all: for as a Man by ſuch general Power might make a Jointure of 500 *l. per Ann.* ſo he might make a Jointure of 50 *l.* or 5 *l. per Ann.* And ſaid there was a great difference between a defective Execution of a Power, and where the Power was not executed at all.

But then for the Plaintiff it was inſiſted, that there were ſome Fee-ſimple Lands, which were deviſed over, and thoſe Lands in the hands of a voluntary Deviſee were as much bound by thoſe Articles, as if they had remained in the hands of the Heir; as where a Truſtee makes a voluntary Conveyance, the Feoffee, according to the Reſolution in *Chudleigh*'s Caſe before the Statute of Uſes, ſtood ſeized to the ſame Uſes; and the Law is the ſame of a Truſt, which is not executed, by the Statute at this Day.

Marſden verſus *Panſhall.*

Caſe 381.
11 Novembris.
Lord Chancellor.

A Country Cloathier ſends Cloaths to his *London* Factor to ſell. Factor Pawns them. Pawnee by Anſwer admits Factor pawned ſome Cloaths, but knows not whether they were the Plaintiff's.

THE Plaintiff was a Cloathier in *Yorkſhire*, and intruſted one *Bumpas* to ſell his Cloaths here in *London*. *Bumpas* after he received the Cloaths from the Plaintiff Pawns them to the Defendant, who was a Pawn-Broker in Town. The Plaintiff's Bill was to diſcover whether thoſe Cloaths came to the Hands of the Defendant; who by Anſwer confeſſed, that ſome Cloaths were Pawned to him by *Bumpas*, but did not admit that they were the Plaintiff's Cloaths, whereby to enable him to bring an Action at Law.

Ordered, that the Cloathier in the Preſence of 2 or more may have a view of them.

Serjeant *Maynard* this Day moved for the Plaintiff, that the Defendant might be ordered to let the Plaintiff, with two

or

or more Perſons preſent have a ſight of the Cloaths pawned by *Bumpas*, which was ordered accordingly; the Meaning of which was, and ſo it was taken by the Court, that the Plaintiff ſhould thereby be enabled to bring an Action at Law.

Hunt verſus *Matthews.*

Caſe 382.
20 Novembris.
Maſter of the Rolls in Court.

A Widow before her Marriage with her ſecond Husband aſſigns over the greateſt part of her Eſtate to Truſtees in truſt for her Children by her former Husband. Tho' this was without the Conſent of her ſecond Husband, yet it being to provide for her Children by former Husband, 'tis good. And Husband ſuppreſſing the Deed decreed to pay 800 *l.* being the Sum proved to be mentioned in the Deed to be the value of the Goods.

THE Caſe was: A Widow before ſhe married the Defendant, her ſecond Husband, aſſigned over the greateſt Part of her Eſtate, to the Value of 800 *l.* to Truſtees, as a Proviſion for her Children by her firſt Husband. The Defendant after his Marriage having got this Deed into his Poſſeſſion ſuppreſſed it.

Upon the Hearing it was inſiſted for the Defendant, that this Deed made by the Widow, a little before her Marriage with the Defendant, was fraudulent, and done with a Deſign to cheat her Husband, and ought not therefore to be countenanced in Equity: and cited the Caſe of Sir *Phillip Howard* and *Baker*, where an Aſſignment made by the Widow before her marrying a ſecond Husband was by Decree ſet aſide.

But the Court thought, that a Widow might with a good Conſcience, before ſhe put her ſelf under the Power of a ſecond Husband, provide for the Children ſhe had by the firſt; and the Deed being ſuppreſſed by the Defendant, by which the Particulars and Value of the Eſtate might appear, Decreed him to pay the 800 *l.* without directing any Account.

Furſor verſus *Penton.*

Caſe 383.
Eodem die.
Maſter of the Rolls in Court.

Husband covenants with his intended Wife

THE Caſe was: A Man before Marriage covenants with his intended Wife, that ſhe ſhould have

Power

Power to diſpoſe of 300 *l.* of her Eſtate, notwithſtanding the Intermarriage. The Husband now brings his Bill againſt the Defendant, in whoſe Hands the 300 *l.* was, ſetting forth that if there was any ſuch Agreement with his Wife, the ſame was diſcharged by the Intermarriage.

that ſhe ſhould have Power to diſpoſe of 300 *l.* of her Eſtate. Whether this Covenant is diſcharged by the Marriage?

For the Defendant it was inſiſted, that he was concerned only as Truſtee; but offered it to the Court, that tho' the Covenant was improvidently taken in the Name of the Wife, whereas it ought to have been in the Name of Truſtees, and tho' it ſhould be admitted that the Marriage in ſtrictneſs of Law had diſcharged the Covenant, yet a Court of Equity would never ſuffer a Truſt to be ſo defeated; and the Court inclined to diſmiſs the Bill: But then the Plaintiff's Council alledging, that the Wife was conſenting that the Mony ſhould be paid to the Husband, the Court adjourned the Cauſe till next Term, when the Plaintiff might bring his Wife into Court to be examined.

In the arguing of this Caſe, the Caſe of *Smith & Ux'* verſus, *Stafford* in *Hob. fo.* 216, was cited, where according to the Book a Promiſe by the Husband to the Wife before Marriage to leave her 500 *l.* at his Death was diſcharged by the Intermarriage: But note, the Caſe of *Clarke* and *Thompſon* (*Cr. Jac' fol.* 571) is directly contrary; and there the Caſe of *Smith* and *Stafford* is cited, and *three Judges* were of Opinion, that the Promiſe was not diſcharged by the Intermarriage; and only my Lord *Hobert* of the contrary Opinion: But neither of thoſe Caſes come up to this Caſe; for here it is that the Wife, tho' married, may diſpoſe of 300 *l.* There it is, that the Husband at his Death would leave his Wife worth 500 *l.* and the reaſon of the Caſe in *Cr. Jac'* is, that it was not a Duty during the Coverture.

Cole verſus *Warden.*

Caſe 384.
15 Novembris.
In Court Lord Chancellor.
If the Equity of Redemption of a Mortgage for Years is Aſſetts to pay Bond-Debts.
See the next Caſe.

THE Plaintiff having a ſubſequent Mortgage and having alſo bought in the Title of the Heir at Law to one *Le Wright*, brought his Bill againſt the Defendant and one *Richardſon* and others, and *Richardſon* by Anſwer ſet forth, that he had a prior Mortgage from *Le Wright*, and alſo Monies due to him by Bond, and on Payment ſhould be ready to reconvey.

For the Defendant it was inſiſted, that as againſt the Heir, the Mortgage being but a Mortgage for Years, the Reverſion, which attracts the Redemption, was Aſſetts at Law, and for that Reaſon the Equity of Redemption was adjudged Aſſetts in this Court in the Caſe of *Davie* and *Dabinett*, which was firſt heard at the *Rolls*, and ſettled upon an Appeal to the *Lord Chancellor*; but it was admitted there was a Difference between a Mortgage in Fee, and a Mortgage for Years; for in the Caſe of *Bennett* and *Box*, which was reſolved with the Advice of Judges, they would not allow, that the Equity of Redemption of a Mortgage in Fee ſhould be Aſſetts in Equity to pay a Bond Creditor: but in this Caſe the Plaintiff has not only the Title of the Heir at Law, but alſo ſubſequent Mortgages, which his Council alledged were to the Value of the Eſtate.

The *Lord Chancellor* directed the Maſter ſhould certifie that Matter ſpecially, and when he ſaw the Value of the Eſtate, he would decree according as the Nature of the Caſe required; his preſent Opinion being, that if there was a Surplus beyond the Mortgages, it ſhould be Aſſetts to anſwer Bond-Debts.

Pluck-

Plucknet versus *Kirk.*

Case 385.
Eodem die.
In Court.

If the Equity of Redemption of a Mortgage in Fee shall be Assetts in Equity to satisfy Bond-Debts.

See the next preceding Case.

AMONGST other Matters in this Case, the Point chiefly disputed was, whether the Equity of Redemption of a Mortgage in Fee, since the Statute of *Frauds* and *Perjuries*, should be Assetts in Equity to satisfy a Debt by Bond; and the *Lord Chancellor* inclined that it was, but respited his Decree till the Master had reported a State of the Case.

Clowdsly versus *Pellham.*

Case 386.
19 Novembris.
Lord Chancellor.

One devises all his Lands to *A* and the Heirs of his Body, Remainder over, and in another Part of the Will devises to *A* all his personal Estate, and makes him Executor, willing him to pay his Debts. This is a Charge upon the Lands as well as on the personal Estate to pay the Debts.

THE Plaintiff's Bill was to have Satisfaction for a Debt owing to him by *Anthony Deane* deceased, who by his Will had devised all his Lands to the Defendant *Pellham* and the Heirs of his Body, with a Remainder over to another; and in another Part of his Will, reciting that he owed the Defendant *Pellham* Mony upon Account, he therefore devised to him all his Personal Estate, and made him Executor, willing him to pay his Debts.

Upon the reading of the Will, tho' the Clause as to Payment of Debts seemed to relate to the Personal Estate only, and tho' the Lands were devised to the Defendant in Tail with a Remainder over to another, and that it was objected that a Tenant in Tail could not be a Trustee, yet the Court decreed both Real and Personal Estate to be sold for Payment of the Testator's Debts.

Durston versus *Sandys.*

Case 387.
24 Novembris.
Lord Chancellor.

A perpetual Injunction awarded against a Bond of Resignation, the Patron making an ill Use of it.

THE Defendant upon his presenting the Plaintiff to a Parsonage took a Bond of him to resign, which tho' in it self lawful, yet the Patron making an ill Use of

of it, *viz.* to prevent the Incumbent from demanding Tythes in Kind, the Court awarded a perpetual Injunction againſt the Bond.

Caſe 388.
Eodem die.
In Court Lord Chancellor.
Marriage Brocage Bond decreed to be delivered up, the Marriage being had without the Conſent of the Woman's Parents.
2 Ch. Rep. 176.
Such Bonds not to be countenanced.

Drury verſus *Hooke.*

THE Bill was to be relieved againſt a Marriage *Brocage* Bond: and it appearing that the Marriage was brought about without the Conſent of the young Woman's Parents, who were then living, the *Lord Chancellor* for that reaſon alone decreed the Bond to be delivered up, terming it a ſort of Kidnapping; and ſaid, there was a material difference, where the Parties were at their own Diſpoſe, and where their Parents were living: tho' ſuch a Bond was in no caſe to be countenanced.

Caſe 389.
26 Novembris.
Lord Chancellor.
A forfeited Mortgage in Fee decreed to be perſonal Eſtate, and to belong to the Executor, and not to the Heir.

..... verſus *Hicks.*

UPON a rehearing of this Cauſe the ſole Point inſiſted on was, where a Man had by his Will deviſed particular Legacies to his Executors, as he had likewiſe done to his Heir, whether the Heir or Executor, there being no defect of Aſſetts, ſhould have ſome Mortgages in Fee made to the Teſtator, that had been forfeited in his Life-time; and the Court confirmed their former Decree in favour of the Executor; but did admit, as this Caſe was circumſtanced, there was much to be ſaid in behalf of the Heir: but ſince it had been often very ſolemly ſettled, that all Mortgages ſhould be looked on as part of the perſonal Eſtate, and that it was now grown the eſtabliſhed Rule of the Court, it was not fit to alter it, in order to accommodate one particular Caſe.

In the Argument of this Caſe was cited the Caſe of *Turner* and *Crane* on the one Side, where an old forfeited Mortgage of a Copyhold was decreed to the Heir: and on

on the other hand the Case of *Baker* and *Thornbury*, settled in the Lord *Nottingham*'s time, where in the Case of an old Forfeited Mortgage in Fee, tho' the Mony by the Proviso was made payable to the Heir, yet it was Decreed to be part of the Personal Estate: and the Case of *Noy* and *Ellis*, tho' the Mortgagors would not Redeem, yet the Land was Decreed to the Executors, against the Heir. 1 Ch. Rep. 283. 2 Ch. Rep. 220.

Coke versus *Fountain.*

Case 390.

Eodem die.

In Court, Master of the Rolls.

UPON a Motion the Defendant *Fountain*'s Council moved, that they might be at liberty to read Depositions in this Cause, which were taken in a Cause where the Plaintiff's Father was a Party; the Suit being in all Matters the same: But on the other side it was objected, that the now Plaintiff not claiming as Heir, and his Father being only Tenant for Life, those Depositions could not be read against him: And after long Debate the Defendant had only the common Order for leave to read those Depositions at the hearing, saving just Exceptions.

Depositions taken in a former Cause cannot be read in another Cause against one who does not claim under the Party against whom those Depositions were taken.

It was said by Mr. *Serjeant Phillips*, that it is a common Case, where one Legatee has brought his Bill against an Executor, and proved Assetts, and afterwards another Legatee brings his Bill, that he should have the Benefit of the Depositions in the former Suit, tho' he was not Party to it.

But if a Legatee brings a Bill against the Executor, and proves Assetts, another Legatee, tho' no Party, may have the benefit of those Depositions.

Traiton versus *Traiton.*

Case 391.

27 Novembris.

Lord Chancellor.

THE Heir having had some Difference with his Mother the Jointress, relating to the Repairs of the Mansion-House, he settles the Estate upon his Brother, but first takes a Penal Bond from him of 500*l.* Penalty in the Name of the Defendant his Sister, that he should never suffer his Mother to come into the House. The Bill was to be relieved against this Bond.

One differing with his Mother settles his Mansion-House on his Brother, but first takes a Bond from him in his Sister's Name that the Brother should not permit his

Mother to come into the House.
Bond set aside in Equity, as an unnatural Bond.

The Court (tho' the Defendant insisted on the Breach of the Bond, and that thereby a Provision was intended her) Decreed the Bond to be delivered up, and cancelled; it being against the Law of Nature to prohibit a Son to cherish his Mother.

Wall & Ux' versus *Thurbane.*

Case 392.
6 Decembris.
Lord Chancellor.
Ante Case 352.

SIR *George Crooke* by his Will devised that his real Estate should descend to his three Daughters and Heirs, provided that his Wife should distribute it in such Proportions as she should think fit. The Mother by Deed executed in her Life-time appoints a very small Proportion for the Plaintiff's Wife, who was one of the three Daughters, and had appointed the rest for the other two Daughters; and the Bill was to be relieved against this unequal Distribution.

Upon long Debate the Court declared the Case was proper and relievable in Equity; for as the Mother here had appointed this Daughter a less Proportion than the other, so she might for some (it may be) causeless Displeasure have allotted her but one barren Acre only; and it would be hard if Equity in such a Case should not interpose: and if the Court might interpose in that Case, it can't then be objected, that the Court ought not to intermeddle, or wants Jurisdiction in the Case in Question: and it is discretionary in the Court, whether it shall relieve in this Case or not; and the Court took time to consider of it, and to be attended with Precedents.

In the Argument of this Case were cited the Cases of
* *Ante Case* 63. *Cracer* and *Perrot*, and * *Gibson* and *Kinven*, where a Man by Will left his Personal Estate to his Wife, to be distributed amongst his Children at her discretion, and she gave all to one Child, and none to another, and the Court controlled that Disposition; such Clauses being generally intended to preserve Obedience only.

But

But *Note*, one main Reaſon in the Caſe laſt cited was, that the Wife had married a ſecond Husband, and being under Coverture her Diſtribution might be influenced by her Husband's Authority.

Nevil verſus *Saunders.*

Caſe 393.
Eodem die.
Lord Chancellor.
Lands limited to *A*, in Truſt for a Feme Covert, and that *A* ſhould receive the Rents and apply them as the Feme, whether ſole or Covert, ſhould direct.
This is a Truſt, and not an Uſe executed by the Statute.

LANDS were given by Will to Truſtees and their Heirs, in Truſt for *Anne* the Defendant's Wife and her Heirs, and that the Truſtees ſhould from time to time pay and diſpoſe of the Rents and Profits to the ſaid *Anne*, or to ſuch Perſon or Perſons as ſhe by any Writing under her Hand, as well during Coverture as being Sole, ſhould order or appoint the ſame, without the intermedling of her Husband, whom he willed ſhould have no Benefit or Diſpoſal thereof; and as to the Inheritance of the Premiſſes in Truſt for ſuch Perſon or Perſons, and for ſuch Eſtate and Eſtates, as the ſaid *Anne* by any Writing purporting her Will, or other Writing under her Hand, ſhould appoint; and for want of ſuch Appointment, in Truſt for her and her Heirs.

The Queſtion was, whether this was an Uſe executed by the Statute, or a bare Truſt for the Wife: and the Court held it to be a Truſt only, and not an Uſe executed by the Statute.

Howe & al' verſus *Howe & al'.*

Caſe 394.
7 Decembris
Lord Chancellor.
A Copyhold Eſtate granted for the Lives of *A*, *B*, and *C*. *A* dies inteſtate. His Adminiſtratrix ſhall have the Eſtate during the Lives of *B* and *C*.

J. S. who had taken a Copyhold Eſtate for the Lives of himſelf and his two Brothers, dyes, leaving a Son: The Uncles during the Life of their Nephew ſuffer him quietly to enjoy; but now he being dead, they diſturbed the Adminiſtratrix of their Nephew; and the Bill was brought by her to be relieved, as having the Title of the firſt Taker, who paid the Fine; the other two Lives being but in the Nature of Truſtees for him.

Upon

Upon long Debate the Court Decreed for the Plaintiff the Adminiſtratrix, againſt the Uncle; tho' it was taken Notice of and preſſed in arguing for the Defendant, that there was not any Cuſtom in the Manor, of which the Eſtate was held, that the firſt Taker might ſurrender; nor is there any ſuch Cuſtom where the Copies run *Succeſſive.*

In the arguing of this Caſe were cited as Precedents of like Decrees, the Caſes of *Powell* and *Theallwell,* * *Clarke* and *Danvers, Thyme* and *Bampfield.*

* 1 Ch. Rep. 310.

Caſe 395.
8 Decembris.
Lord Chancellor.

Powell verſus *Arderne* and *Chevall.*

If a Defendant demurs, becauſe the Bill contains ſeveral diſtinct Matters againſt ſeveral Defendants, he muſt by Anſwer deny Combination, if it is charged by the Bill.

DEfendant demurred, becauſe the Plaintiff's Bill was brought againſt ſeveral Defendants for ſeveral diſtinct Matters. The Demurrer was Over-ruled, becauſe the Plaintiff by his Bill had charged the Defendants with Combination, which the Defendant had not denyed by Anſwer.

Caſe 396.
11 Decembris.
Lord Chancellor.

Barbon verſus *Searle.*

After a Decree of Diſmiſſion affirmed on an Appeal to the *Lords,* Bill is brought for diſcovery of a Deed, ſaid to be Burnt pending the Appeal, which made out Plaintiff's Title, that after ſuch Diſcovery Plaintiff might apply to the *Lords* for Relief.

Defendant upon a Demurrer ordered to Anſwer, but Plaintiff to proceed no further without Leave of the Court.

THE Plaintiff by his Bill, which was partly Original and partly a Bill of Review, ſet forth the Order made by the *Peers* in *Parliament,* whereby *Clerke,* the Plaintiff in the Original Cauſe, whoſe Intereſt the now Plaintiff hath, was relieved as to a Moiety of the Perſonal Eſtate, and diſmiſſed as to the Real; and that ſuch Order had not been made, but that the Defendant ſuppreſſed the Evidences, and had pending the Appeal (as the Plaintiff hath ſince diſcovered) burnt the Deed that made out the Plaintiff's Title; and therefore prayed the Defendant might Anſwer and diſcover the Matters aforeſaid, the Plaintiff alledging in his Bill that he did not thereby deſign to Impeach the Order of the Houſe of *Lords,* but that by this Diſcovery he might be capacitated to apply to the *Lords* in

in *Parliament*, when there ſhould be a Seſſions, for ſuch Relief as the nature of the whole Caſe, when diſcovered, ſhould require.

To this Bill the Defendant Demurred; and in arguing the Demurrer Serjeant *Maynard* for the Defendant inſiſted, that after a Judgment given upon an Appeal in the Houſe of *Lords* this Court could not intermeddle further, than to ſettle ſo much of the Cauſe as the *Lords* had tranſmitted to this Court, which concerned only the Perſonal Eſtate; and that Matter this Court had already, purſuant to the direction of the Houſe of *Lords*, determined; and that no Bill of Review would lye in this Caſe. That Bills of Review are not favoured, and are tied up to ſtrict Rules; and for that purpoſe cited the Caſe of *Dunny* and *Filmore*, where upon a Bill of Review the Court had decreed the whole Eſtate to the Plaintiff; and tho' it appeared even upon the face of the Decree, that the Plaintiff had a Title but to one Moiety only, yet it was there Reſolved, that no Bill of Review would lye upon a Bill of Review; and the Defendant was left without Remedy. And he likewiſe cited *Morgan*'s Caſe, where upon a Bill of Review the Plaintiff could not produce the Deed, and ſo failed at the Hearing of making out his Equity; and tho' the Deed came afterwards to his Hands, which plainly made out his Title, yet it was adjudged to be a Right without a Remedy, and the Defendant to be without Relief: and he likewiſe obſerved, that the Plaintiff's Title of his own ſhewing was only as Aſſignee of *Clarke*; and an Aſſignee can in no Caſe have a Bill of Review, much leſs an Aſſignee that comes in, as the Plaintiff did, *pendente lite*.

Ante Caſe 124. 2 Ch. Rep 133.

For the Plaintiff it was anſwered, that the Streſs of the Serjeant's Argument was levelled, as ſuppoſing this to be a Bill of Review; whereas it was as well an Original Bill, as a Bill of Review; and that a difference had been commonly taken and allowed in this Court (tho' it was not neceſſary to maintain the Bill in queſtion) between a Decree and a

Diſmiſſion, (to wit) where there is a Decree, *that* is not to be alter'd but by Bill of Review; but where there was only a Diſmiſſion, an Original Bill might be brought upon a new Equity: and ſaid, they did not pretend to ſay, that this Court could reverſe or alter the Order of the Houſe of *Lords*: But as there is little doubt to be made but that the Parliament, if it had been ſitting, upon a Petition would have directed this Matter to have been examined in this Court, in regard that it is not the courſe there to take Anſwers upon Oath; ſo in the Interval of Parliament, when we cannot obtain ſuch Direction, this Court may well proceed to have a Diſcovery of this Matter; or elſe by Death or otherwiſe the Plaintiff peradventure may loſe the benefit of it; ſo that this Bill is not to change or alter the *Lords* Order, but in effect auxiliary to the Proceedings before them.

The Court hereupon ordered the Defendant to anſwer the Bill; and when he had ſo done, the Plaintiff was not to proceed any further without the ſpecial Leave of the Court.

Crde verſus *Heming.*

Caſe 397.
Eodem die.
Lord Chancellor.

If a Mortgagor agrees the Mortgagee ſhall enter, and hold till he is ſatisfied; length of time is no Objection to a Redemption.

THE Bill was to redeem a Mortgage; and the Defendant demurred, by reaſon that of the Plaintiff's own ſhewing it appeared, the Mortgage was 60 Years old.

The Demurrer upon Argument was over-ruled, becauſe it was charged in the Bill, that the Mortgagor agreed the Mortgagee ſhould enter and hold, till he was ſatisfied; which is in the nature of a *Welch* Mortgage; and in ſuch Caſe the length of time is no Objection.

The

The Earl of *Kildare* verſus Sir *Morrice Euſtace* and *Fitzgerald.*

Caſe 398.
3 Decembris.
Lord Chancellor
Lord Chief Juſtice Beddingfield.
Lord Chief Baron Atkins.
Ante Caſe 377.
Poſt Caſe 399. 404. 11.

THE *Lord Chancellor* and the Judges having been attended with Precedents, Sir *John Holt* argued for the Plaintiff, as to the preliminary Point only, (to wit) whether this Court had Juriſdiction, and might hold Plea of the Lands in queſtion which lay in *Ireland.* *Firſt,* That a Truſt was purely perſonal; and that a Court of Equity here might as well hold Plea of a Truſt, that concerned Lands in *Ireland,* as the other Courts of Law might of other perſonal Contracts, tho' the ſame might concern Lands in *Ireland*: As if a Man being here in *England* enters into Bond for granting a Rent-charge out of Lands in *Ireland,* there is no Queſtion but it may be ſued in any of the Courts of Law here: ſo a Covenant enter'd into in *Ireland,* or a Contract made there, may be ſued here; and ſo *e converſo.* And it has been held, (it is my Lord *Hobart*'s Opinion) that an Action of the Caſe will lye for a Breach of Truſt. *Secondly,* That *Ireland* hath its Courts of its own by Grant from the King; but not excluſive of the King's Courts here, for *Ireland* is a conquered Kingdom; and a Decree of this Court may as well bind Land in *Ireland,* as by every Day's Practice it doth Lands that lye in foreign Plantations: and for Precedents cited the Caſe of a *Scire fac'* (20. *H.* 6. *fol.* 8.) brought in the *Chancery* here to repeal a Patent of Lands in *Ireland.* If a Man, that is beneficed here, is made a *Biſhop* in *Ireland,* that comes within the Statute of *H.* 8. againſt *Pluralities,* and ſhall make void his Living here in *England*; and it was reſolved in *Evans* and *Aſcough*'s Caſe, *Latch. fol.* 234. and *Dowdale*'s Caſe, in *Co.* 6th *Report,* that Lands in *Ireland* ſhall be Aſſetts to ſatisfy a Bond-debt here, but otherwiſe of Lands in *Scotland.* And the neceſſity of the Caſe is conſiderable; for ſhould not this Court relieve in ſuch a Caſe as

as this, where the Land lies in *Ireland*, and the Truſtee lives in *England*, the *Ceſtuy que truſt* would be without remedy; for tho' it is true, we may ſerve him with a *Subpæna* out of this Court, returnable in the *Chancery* in *Ireland*; yet if he will not appear upon that *Subpæna* we can proceed no further; we cannot take out any *Attachment* upon it. And for Precedents in this Court of Decrees made concerning Lands in *Ireland* were cited the Caſes of *Leake* and Lord *Ranelagh*, 8. *Car.* 1. in the Lord *Keeper Coventry*'s time. *Archer* and *Preſton* ſoon after the *King*'s *Reſtauration*, and the Caſe of the Lord *Thomond* and *Spencer*.

The Defendant's Council in a manner waved the preliminary Point, and would not enter into the Debate, whether this Court might not decree the Truſt of Lands in *Ireland*, the Truſtee living here; but that it was certainly a Matter diſcretionary in the Court, whether they would do it or not: and that as this Caſe was circumſtanced, they apprehended the Court would not interpoſe. *Firſt*, That in this Caſe there had been no leſs than two Judgments in the Courts of Law in *Ireland*, and no leſs than *three* Bills in Equity. *Secondly*, That Sir *Morrice Euſtace* the Truſtee did not live in *England*, but came here occaſionally upon other Buſineſs; and that it would be unreaſonable to keep him from his own Country, and from all his other Concerns, to attend this Suit. *Thirdly*, That the Caſe ariſes upon Facts properly triable in *Ireland*, to wit, whether *Fitzgerrald*, for whom this Truſt was created, was the ſame *Fitzgerrald* that was in the Rebellion; and this Fact had been twice tried in *Ireland*, and found againſt the Plaintiff. *Fourthly*, That this Caſe depends upon Conſtruction of the Act of Settlement in *Ireland*; for if not only the Truſt, but the Land it ſelf, was actually veſted in the King by that Act, then it was a pure Title at Law, and no ground for a Suit in Equity: and that the Lands were ſo actually veſted, was the Opinion of the *Chancellor* and *Judges* in *Ireland*, who were the proper Expoſitors of that Law. And it was further inſiſted, that Truſts which concern Lands are not

not purely Perſonal; but in ſome ſort Local; as particularly in the remedy by Injunction for the Poſſeſſion: and that now Sequeſtrations are become a common Proceſs, tho' at firſt introduced in the Lord *Bacon*'s time, and then but ſparingly uſed in Proceſs, and after a Decree to ſequeſter the thing in demand only. And now likewiſe Bills are common here for a Partition, which ſeem to concern nothing but the Land it ſelf; but that was grounded upon the Statute, which makes one Tenant in common Accountable to the other; ſo that now ſince the Statute, they are become as it were Truſtees the one for the other. Nor is the Plaintiff remedileſs, his Truſtees living in *England*, if that were ſo, for a Decree made in *Ireland* may be carried into an Execution by *Engliſh* Bill in this Court againſt his Truſtee here. And for Precedents where this Court refuſed to hold Plea of Lands in *Ireland*, they cited Sir *William Pettit*'s Caſe, where the Bill being to have a Partition of Lands in *Ireland* was diſmiſſed (*but note in that Caſe as to the Matter of Account it was retained*) and in the Caſe of the *Counteſs of Lancharle* againſt *O Bryan*, 24 *Car' Secundi*, upon Articles of Marriage, all the Tranſactions having been in *Ireland*, the Bill was diſmiſſed.

Sequeſtrations firſt introduced in Lord *Bacon*'s time.

Bill for a Partition of Lands in *Ireland* diſmiſſed, but an Account of Profits Decreed.

The Plaintiff's Council having before ſpoke only to the Preliminary Point touching the Juriſdiction of the Court in caſe of a Truſt of Land in *Ireland*, which was now waved by the Defendant's Council, and the Court ſatisfied as to that Matter; and the *Lord Chancellor* inclining to diſmiſs the Bill, becauſe the Caſe turned upon Conſtruction of the Act of Settlement, and upon a Fact which was proper to be tried in *Ireland*, and not here, our Law differing from the Law in *Ireland*; it was replyed by the Plaintiff's Council, that the Courts of Law in *England* were proper Expoſitors of the *Iriſh* Laws; nay their Judgment is to control the Opinion of the Judges in *Ireland*, as upon all Writs of Error; and *a fortiori* may they take upon them to Judge of a Matter or Expound a Law, that comes before them in the firſt Inſtance: and that there is

no difficulty in trying here, whether this be the ſame *Fitzgerrald* or not; it may be done here as well as in *Ireland.* And as touching the Act of Settlement, tho' the ſame be copiouſly penned, and hath the Words, Truſts, Equities, *&c.* and that all ſhall be actually veſted in the King; yet the Conſtruction of that Act is natural and plain, and muſt be taken *reddendo ſingula ſingulis*, that is to ſay, Lands in Poſſeſſion veſt abſolutely in Poſſeſſion, a Truſt veſts as a Truſt, and the like, and amounts to no more than that they ſhall be as much in the King's actual Poſſeſſion, as if an Office was actually found; and ſo has it been reſolved here upon other Statutes of Attainders, that have as liberal Clauſes as this Act of Settlement has. The Caſe of *Smith* and *Wheeler* in the *King*'s *Bench* concerning *Simon Maine*'s Eſtate, being the firſt Caſe there ſettled by the Lord Chief Juſtice *Hales*. Lord *Holland*'s Caſe on the Statute of *H.* 8. and *Powly*'s Caſe.

1 *Mod.* 16.

After long Debate, the Judges concurring with his Lordſhip, that the Court had a proper Juriſdiction in this Caſe, and that the Judges in *England* were proper Expoſitors of the *Iriſh* Laws, and that by the true Conſtruction of this Statute the Truſt was veſted in the *King*, and not the Land it ſelf, and the Proof being full as to the Identity of the Perſon, decreed for the Plaintiff, as to one Moiety; the Truſt as to the other Moiety being for Sir *Morrice Euſtace* himſelf, and not for *Fitzgerrald.*

Judges in *England* proper Expoſitors of the Laws in *Ireland.*

D E

DE
Termino S. Hillarii,

2 & 3 *Jacobi II.* 1686.

In Curia Cancellariæ.

The Earl *of Kildare* verſus Sir *Morrice Euſtace & al'.*

Caſe 399.
25 Januar.
Lord Chancellor.
Lord Chief Juſtice Beddingfield.
Lord Chief Baron Atkins.
Ante Caſe 377. 398.
Poſt Caſe 404. 411.

THE Defendant having obtained an Order for the rehearing of this Cauſe, Mr. *Pollexfen* argued for the Defendant, ſingly as to that Point, that by the Act of Settlement not only the Truſt, but the Lands themſelves, as this Caſe was, were actually veſted in the King, and conſequently what Title the Plaintiff had, was purely a Title at Law, and not a Truſt or equitable Title; and put the Caſe ſhortly thus, (*viz.*) that Sir *Morrice Euſtace* being an innocent Proteſtant was poſſeſt of the Lands in Queſtion for the remainder of a Term for Years in Truſt for *Fitzgerrald* being an innocent Papiſt, and that the Lands in queſtion were actually ſeized by the late pretended Common-wealth, and the *Cuſtodiam* of them granted. And the Fact was admitted ſo to be, and was ſo ſtated in the Plaintiff's Bill.

And firſt he obſerved that if the Words of the Act would bear it, it was but reaſonable that the Eſtate in Law ſhould veſt and go along with the Truſt, it being no prejudice to any one: the Truſt being the Subſtance, and the

the Eſtate in Law, but as it were, the Shadow. *Secondly*, That the deſign of the Act was the eſtabliſhing the Poſſeſſions of theſe forfeited Lands, and to make the Title unqueſtionable; which Intent is beſt anſwered by veſting, not only the Truſt, but the Lands themſelves; and the Act is fully and liberally penned for that Purpoſe. That theſe Lands are actually veſted by the enacting Clauſe, *viz.* All Land whereof any Soldier or Adventurer was in Poſſeſſion, or whereof the *King* was in Poſſeſſion, or whereof the *Cuſtodiam* was granted, or that was ſeized or ſequeſtred by the pretended *Common-wealth*, or that any Perſon by or under their Title or by reaſon of the late War received the Rents or were in Poſſeſſion on the *ſeventh* of *May* 1659. Now the deſcription of having the *Cuſtodiam* granted, of having been ſeized and ſequeſtred *&c.* comprehended the Lands in Queſtion. That as to the Objection, that the veſting words muſt be taken *reddendo ſingula ſingulis*, that is, that Lands in Poſſeſſion ſhall be veſted as Lands in Poſſeſſion, a Truſt of Land veſted as a Truſt, *&c. that* may hold of Lands not included within thoſe particular Deſcriptions; but to apply ſuch Conſtruction to ſuch Lands ſo deſcribed, were to render all thoſe particular Deſcriptions and the main Body of the Act fruitleſs and nugatory. That the particular Exception in the Proviſo, as to Proteſtant's Eſtates, ſtrengthens the veſting Clauſe as to the Lands and Truſts of nocent Papiſts: and that the particular penning of this Act diſtinguiſhes this Caſe from all the Caſes upon other *Engliſh* Acts for Forfeitures.

Sir *John Holt* argued for the Plaintiff, that this Act of Parliament was made for theſe ſpecial Purpoſes. *Firſt*, To ſupply the defect of Attainders. *Secondly*, The want of Inquiſition and default of Office. *Thirdly*, That Truſts in *Ireland* were not forfeited before this Act; nor were the Truſts of Inheritances in *England* forfeited before the *Stat'* 33. *H.* 8. as is reſolved *Co.* 7. *Rep. fol.* 34. and inſiſted on the Caſe of
1 Mod. 16. *Smith* and *Wheeler*, and that a Truſt ſhall veſt as a Truſt only, and that where a Traitor was to have an Eſtate on Per-

performance of a Condition, there notwithſtanding the veſting Clauſe the King muſt perform the Condition. And as to the Exception, a cautionary Proviſo cannot enlarge the enacting part.

The *Lord Chancellor* inclined, that the Eſtate in Law as well as the Truſt was actually veſted; but recommended the Caſe to the Judges for their further Conſideration.

Cock verſus *Berriſh.*

Caſe 400.
26 Januar.
Lord Chancellor.

J. S. makes his Will, and the Defendant *Berriſh* and another Executors, and deviſes to them Legacies of 20 *l.* a-piece, and likewiſe deviſes to them 800 *l.* in Truſt for the Payment of ſeveral Annuities to *A*, *B*, and *C*, for Life, far exceeding the Intereſt of the 800 *l.* and deviſes the Surplus of his Eſtate to his Nephews *Charles Cock* and *John Cock*, equally to be divided betwixt them, and appoints the ſame to be paid to his Executors, in Truſt to be laid out for the Benefit of the reſiduary Legatees. One of the reſiduary Legatees dies in the Life-time of the Teſtator, and the other happens likewiſe to die within two Years after the Teſtator's Death.

A deviſes the ſurplus of his Eſtate to his two Nephews, equally to be divided between them, and appoints his Executors to lay it out for their Benefit. One of them died in the Teſtator's Life-time.

The whole decreed to the Survivor and not to the Executors, the Teſtator not intending them any Benefit.

The firſt Point was, Whether, in regard by the Deviſe of the Surplus *Charles* and *John Cock* were Tenants in common and not joint Tenants, the Survivor ſhould have the whole Surplus. And the Court decreed him the whole; the Deſign of the Will ſhewing the Teſtator chiefly intended their Benefit, and not any Advantage to his Executors, who were in a manner Strangers and but remotely related; and the rather for that, tho' the Deviſe is not wholly joint, but ſevered by the Words *equally to be divided*; yet in the latter Clauſe, where he appoints the Executors to lay out the Mony for their Benefit, there it is joint again.

A Second Queſtion was, Whether, the Annuities being determined by the Death of the Annuitants, what remains of

A gives 800 *l.* to his Executors on truſt to pay Annuities to *B* and *C*, for their

Lives, exceeding the Intereſt of the 800 *l.* and gives the Surplus of his Eſtate to *D* and *E.* The Annuitants being Dead, the 800 *l.* ſhall go to the Reſiduary Legatees, and not to the Executors.

of the 800 *l.* ſhould go to the Executors, or to the ſurviving reſiduary Legatee. Decreed alſo with the Plaintiff, it not being a Conditional Deviſe to them of 800 *l.* paying ſuch and ſuch Annuities, but only depoſited in their Hands in Truſt for the Payment thereof: and as they were no way obliged to pay more than the 800 *l.* ſo there is no reaſon that they ſhould have the Benefit of what remained unexhauſted of the 800 *l.* in Payment of the Annuities.

Caſe 401.
28 Januar.

Dunn verſus *Allen.*

In Court, Maſter of the Rolls.

A Purchaſor or Aſſignee, who comes not in in privity, is not intitled to bring a *Scire fac'* to revive a Decree.

THE Plaintiff purchaſed the Manor of *Lenthall* in the County of *Hereford* of Sir *Sampſon Eure*, who, upon Articles of Agreement made betwixt him and his Tenants for the ſettling of Herriots and ſtinting the Common, obtained a Decree for Confirmation thereof. The Plaintiff firſt brought a *Scire fac'* to revive this Decree, which was diſcharged by the late *Lord Keeper North*, in regard that the Plaintiff, who claimed as a Purchaſor or Aſſignee, and comes not in in privity, is not intitled to bring a *Scire fac'* to revive the Decree: but the ſame was diſcharged without Coſts, for that the Defendant did not Demurr to the *Scire fac'*, as the *Lord Keeper* ſaid he might have done.

A Demurrer may be put into a *Scire fac'* to revive a Decree.

And now the Plaintiff brought his Bill to revive the Decree, and prayed no other Relief; to which the ſame Objection was made, as had been before to the *Scire fac'*; the Plaintiff being no more intitled to bring a Bill of Revivor than a *Scire fac'*; there being no other difference betwixt them, ſave only that a *Scire fac'* lies, when a Decree is ſigned and inrolled, and a Bill of Revivor upon an Abatement before ſuch time as the Decree is ſigned and inrolled: but an Aſſignee or a Purchaſor, who came not in in privity, can in no Caſe revive; but ought to bring an Original Bill to have a Parallel Decree made; in which it may be uſed as a good Argument or Inducement to the Court, that there was ſuch former Decree, to make a like Decree, if no ſufficient Reaſons are ſhewed to the contrary:

but the former Decree can no ways be revived, nor carried into an Execution, ſave only by the making a Parallel Decree; and the Plaintiff hath now no ſuch Bill: And this was the Objection as to the Form; and as to the Matter, it appeared of the Plaintiff's own ſhewing, that this Agreement was made only betwixt Perſons that were bare Tenants for Life; for on the one hand Sir *Sampſon Eure*, the Lord of the Manor, was but Tenant for Life; and on the other hand the Tenants were but likewiſe Tenants for Life, by Settlements made precedent to theſe Articles, on which the Decree was founded; ſo their Agreement could in no ſort bind, on the one hand or the other, the Perſons who upon the reſpective Deaths of the Tenants for Life became Tenants in Tail.

A Decree for confirming an Agreement between the Lord and his Tenants for ſettling Heriots and ſtinting the Common revived by a Bill brought by a Purchaſor who did not come in in Privity, and confirmed, tho' the Lord and his Tenants were only Tenants for Life. But *Quære.*

But the *Maſter* of the *Rolls* was of Opinion, that theſe Articles tending to ſettle the Cuſtoms of the Manor, which were Immemorial, and before the Statute *de Donis*, and for ſtinting the Common and preventing Suits, ought to bind the Iſſue in Tail, tho' made only by Tenant for Life: and he would not preſume, that the Tenant in Poſſeſſion would do any thing in prejudice of the Tenants right: and Decreed that the former Decree ſhould be confirmed, and revived and executed. *Quære.*

Beard verſus *Nutthall.*

Caſe 402.
29 Januar.
In Court, Maſter of the Rolls.

THE Plaintiff's Husband after Marriage enters into a Voluntary Bond to ſettle a Jointure of the Value of on his Wife, and afterwards ſettles Lands of that Value upon his Wife in Jointure, and thereupon the Bond was delivered up to be cancelled. The Husband dies, and the Jointreſs is evicted. The Bill was that the Wife being Adminiſtratix of her Husband might retain of her Husband's Perſonal Eſtate againſt the Defendants, who claimed a Share of the Perſonal Eſtate upon the Statute of Diſtributions, to the Value of her Jointure; there being no Creditors in the Caſe.

Voluntary Bond after Marriage to make a Jointure to a Wife, Husband accordingly makes a Jointure. Wife gives up the Bond, the Jointure is Evicted. The Jointure ſhall be made good out of the Husband's Perſonal Eſtate.

The

The Court ordered that in regard the Plaintiff was now become intitled to Dower, that ſhe ſhould proceed at Law for Recovery thereof, and what the ſame ſhould fall ſhort in Value of the Jointure, ſhould be retained by her out of the Perſonal Eſtate, notwithſtanding the Bond was after Marriage and voluntary, and delivered up to be cancelled: For an Agreement, tho' voluntary, under Hand and Seal, ought to be Decreed by this Court: and the Delivery up of the Bond by a Feme Covert could no way bind her Intereſt.

Caſe 403.
1 Februar.

March verſus *Bennett.*

In Court, Maſter of the Rolls.

Whether the Court will Decree Satisfaction of a Bond-Debt of the Anceſtor out of the Profits of the Real Eſtate during the Minority of the Infant Heir, where there is a Deficiency of Perſonal Aſſetts.

THE Bill was to be relieved againſt an old Bond entered into by the Plaintiff's Father, on which the Plaintiff was now ſued as Heir to his Father; and it appearing that the Plaintiff's Father left no Perſonal Eſtate, but left an Eſtate in Fee Simple of 300 *l. per Ann.* which deſcended to his Son, who was then but *two* Years old, the *Maſter* of the *Rolls* took it to be a ſtrong Objection, that in almoſt 20 Years time this Debt was never demanded of the Heir: To which it was anſwered, that during the Plaintiff's Minority they had no Remedy, nor could compel the Infant's Guardian to pay the Debt out of the Profits of the Infant's Eſtate; nor was ever any ſuch Decree made in this Court. But the *Maſter* of the *Rolls* declared he thought ſuch Decree to be juſt and equitable; and if ſuch Caſe came before him he would decree Satisfaction out of the Profits of the Infant's Eſtate. *Sed dubitatur.*

Caſe 404.
4 Februar.

The Earl of *Kildare* verſus Sir *Morrice Euſtace.*

Lord Chancellor. Lord Chief Juſtice Beddingfield. *Lord Chief Baron* Atkins.

Ante Caſe 377. 398. 399. *Poſt Caſe* 411.

THIS Cauſe coming on this Day to be Re-argued, there were two Points made by the Plaintiff's Council: *Firſt*, Whether the Eſtate in Law was executed by the Act of

of Settlement. *Secondly*, Admitting it was ſo, yet whether the Defendant having no right to one Moiety, as appears by his own Anſwer, either in Law or Equity, the Plaintiff ought not to have a Decree for that Moiety.

As to the firſt Point, the *Lord Chief Baron* ſeemed ſtill to doubt, whether the Eſtate in Law was executed by this Statute: But the *Lord Chief Juſtice* and *Lord Chancellor* were clear of Opinion, that by the particular penning of this Statute, not only the Truſt, but the Eſtate in Law, was actually veſted in the King, and well granted to the Plaintiff's Truſtees.

As to the ſecond Point, it was inſiſted on by the Council for the Plaintiff, that he ought to have a Decree for the Moiety; for that it appearing by the Defendant's own Anſwer that he had no Title thereunto (taking *Fitzgerrald*, who was the Owner of this Eſtate, to be one and the ſame Perſon with that *Fitzgerrald* who was the nocent and forfeiting Perſon, as was clear by the Proofs in the Cauſe he was the ſame Perſon) it was then againſt Conſcience to ſuffer the Defendant, who had the good Fortune at Law to obtain a Verdict for the whole, to take out Execution thereupon, and to put the Defendant about to try his Fortune at Law again; and the rather for that it had been a doubt, and there were different Opinions amongſt the Judges in *Ireland*, whether the Eſtate in Law was veſted in the King or not: and tho' it is objected that where a Man has a Title at Law he ought to purſue his legal Remedy, and ſhall not have a Decree in Equity; yet that is not always ſo; and the daily Practice of this Court in many Caſes is otherwiſe: as where a Creditor by Bond or the like brings his Bill for a diſcovery of Aſſetts, and having proved Aſſetts here, he ſhall have a Decree for his Debt, and not be put to proſecute at Law for the ſame; and in many ſuch like Caſes the Court never ſends the Plaintiff to Law where a Title appears for him: and beſides in this Caſe there was a Neceſſity of a Decree for the

Plaintiff againſt his Truſtees, who were only Patentees in truſt for the Plaintiff: and it appearing to the Court that he had a Title againſt all the other Defendants, the Decree ought to be uniform, and made againſt them all: and this the Court thought reaſonable: But in regard this Matter was new, and had not been before under Conſideration, the Court took time to conſider further of it, and to hear what the Defendant's Council had to ſay to it.

Caſe 405.
Eodem die.
In Court, Lord Chancellor. Lord Chief Juſtice Beddingfield. *Lord Chief Baron* Atkins.
Ante Caſe 375. *Poſt Caſe* 410.

Earl of *Winchelſea* verſus *Norcliffe.*

THE Lady *Winchelſea* having Iſſue by her former Husband Sir *John Wentworth* two Sons, *viz. Thomas* the eldeſt Son, and *John* her ſecond Son, ſettles the Lands in queſtion to the Uſe of herſelf for Life, Remainder to *John* her ſecond Son and his Heirs, he paying unto *Katherine* her Daughter 1200 *l.* within ſix Months after the Eſtate ſhould fall in Poſſeſſion; provided if *Thomas* the eldeſt Son ſhould die without Iſſue, ſo as his Eſtate ſhould come to *John*, that then if *John* did not within *ſix* Months afterwards pay 1500 *l.* to *Katherine*, the Lands ſhould go to *Katherine* and her Heirs. *Thomas* dies without Iſſue, ſo that his Eſtate came to *John*, who was under Age and neglected to pay the 1500 *l.* and in truth the Lands were not worth that Money; and *Katherine* being dead without Iſſue, the queſtion was between the *Earl* of *Winchelſea* the Adminiſtrator of *Katherine* his Daughter, and Dame *Elizabeth Finch* Siſter and Heir of Dame *Katherine*.

The Plaintiff inſiſted that this was only in the nature of a Security for Money, and that conſequently he became intitled thereunto as Adminiſtrator; and the Defendant inſiſted, that it was not a bare Security for Money, but rather in the nature of a Settlement, and a plain Limitation of the Eſtate over upon default of Payment at the day appointed, and that therefore ſhe ought to have this Eſtate, as being Heir at Law to Dame *Katherine*; and the

the rather for that *John*, who had the Title of Redemption in caſe the Eſtate was redeemable, deſires not to redeem the ſame.

The *Lord Chancellor* with the Concurrence of the Judges diſmiſſed the Plaintiff's Bill, declaring it was not in the nature of a Security for Money, but a Settlement with a plain Limitation over upon default of Payment to Dame *Katherine* and her Heirs; and the plain Intention of the Party appears to be upon the face of the Deed, by the different Penning of the two Proviſoes, that in the latter Caſe the Land it ſelf in default of Payment ſhould go over to the Lady *Katherine* and her Heirs: And to make this a redeemable Eſtate was to deſtroy the known difference in the Law Books between a Condition and a Limitation over.

Lord *Hollis* verſus Lady *Carr & al'.*

Caſe 406.

5 Februar.

In Court.

Lord Chancellor.

One deviſes his Lands for Payment of his juſt Debts. Teſtator, while a Student at *Cambridge*, had been by ſurprize prevailed upon to give a Covenant for Payment of a Portion to his Siſter; but afterwards the Teſtator all along conteſted this Debt; yet decreed this to be a Debt to be paid within this general Proviſion. *Ante Caſe* 135.

THIS Cauſe coming on this Day to be heard again, and the Plaintiff by his now Bill ſeeking Relief upon the Will of Sir *Robert Carr*, who had deviſed his Lands for Payment of his juſt Debts, it was inſiſted for the Defendants, that the Plaintiff's Debt was not within the intent and meaning of this Proviſion for Payment of Debts; that Sir *Robert Carr* always obſtinately oppoſed the Payment of it, and looked upon it, that he was ſurprized and circumvented in the Covenant obtained from him, when he was but juſt come of Age, and a Student at *Cambridge*, for the Payment of his Siſter's Portion, to which he was no way liable: and that therefore he always refuſed to levy a Fine, whereby to ſubject his Lands for Payment of it, altho' he was decreed ſo to do. And they cited the Caſe of *Hollis* and *Norden*, where a Debt, that the Party had always conteſted to the laſt, was by the Lord *Keeper North* adjudged not to be within the Intent of a Proviſion made by a Perſon for Payment of all his juſt Debts. And ſuch Proviſions have not been extended to all ſorts of Debts: as Debts that

Debts arising by a Misfeazance, as for an Escape or Breach of Trust or contracted *mala fide*, not within a general Provision for Payment of Debts.

that arise by a Misfeazance, as an Escape or Breach of Trust, which were contracted *mala fide*, have never been taken to be within a general Provision made for Payment of Debts.

Lord Chancellor. Sir *Robert Carr* has devised his Estate for Payment of all his just Debts, and the Plaintiff's Debt must now be taken to be such, the Law has said it is a just Debt; and had not Sir *Robert Carr* devised his Lands for the Payment of his Debts, they would have descended on his Heir, and been Assetts in her Hands, and liable to have satisfied the Plaintiff's Demand on Sir *Robert Carr's* Covenant; and therefore Decreed the Debt with Interest.

Case 407.
Eodem die.
In Court, Lord Chancellor.
Ante Case 299. 311.
Post Case 446.

Stapleton versus *Sherrard.*

THE Matter in Question concerned the Right and Distribution of the Personal Estate of an Inhabitant of the Province of *York*, who died intestate.

Per Cur'. The Saving in the Statute for Distribution of Intestates Estates goes only to the Customary Part, and the Testamentary Part is out of the Custom, and must go in a course of Administration, and be distributed according to the Statute.

Case 408.
Eodem die.
In Court, Lord Chancellor.
A and *B* being about to Marry surrender their respective Copyhold Estates to the Use of them two and the Survivor. The Man dies before the Marriage, and the Woman enters on his Land, and after 30 Years quiet

Hamond versus *Hicks.*

UPON a Treaty of Marriage, the Man and Woman having each of them Copyholds of Inheritance, they mutually surrender the same to the Use of them two and the Survivor of them, and before any Marriage was had the Man happens to die. Upon his Death, which was about *thirty* Years since, the Woman by vertue of the Man's Surrender enters on his Copyhold Estate, and enjoyed the same ever since. The Heir of the Man now brought this Bill to have the Estate resurrendred, and for an Account

count of the Profits, inſiſting, that the Marriage never took effect, and that it was a Truſt for the Husband and his Heirs until the Marriage took effect.

Enjoyment ſhe was decreed to ſurrender to the Heir and account for the Profits.

The *Lord Chancellor* decreed a Reſurrender, and an Account of the Profits from the Death of the Man.

Aſpinwall verſus *Caſe & al'.*

Caſe 409.
8 Februar.
In Court, Lord Chancellor.

SIR *Gilbert Ireland*, by Deed executed in his Life-time, makes a Leaſe for 500 Years to *ſix* Truſtees therein named, with a Power to make Leaſes for 21 Years or 3 Lives at any time within One and thirty Years after the Death of Sir *Gilbert* and his Lady, and the Survivor of them; and this is thereby declared to be in Truſt for the Payment of his Debts, and that the Surplus ſhould be to and for ſuch Purpoſes as he ſhould by his Will direct and appoint; and gives to two of the Truſtees that were intended to be the acting Perſons 20 *l. per Ann.* for their pains; and there is a Proviſo, that if ſuch Perſon to whom the Inheritance ſhould belong, ſhould confirm ſuch Leaſes as ſhould be made by the Truſtees, and undertake the Payment of ſuch Debts as ſhould be then unpaid, the Term for 500 Years ſhould ceaſe, *&c.* And by Will of the ſame date, reciting the Deed and Power to diſpoſe by Will, appoints that the Truſtees ſhould have the Surplus to be received by Profits and raiſed by leaſing within the 31 Years after the Deceaſe of Sir *Gilbert* and his Lady and the Survivor of them, without Account; and deviſes the Reverſion to the Plaintiff for Life, and to his firſt and other Sons in Tail.

The Plaintiff by his Bill offered to pay all the Debts, and ſought to be relieved againſt this Power in the Truſtees for making Leaſes during the 31 Years. And for the Plaintiff it was inſiſted, that this was a very ſtrange and unuſual ſort of Settlement, and upon the Face of it appeared

to have been a Surprize upon Sir *Gilbert* by the Contrivance of Mr. *Entwiſle*, who drew the Conveyance; and the principal Matter intended by the Deed appeared to be only a Proviſion for Payment of Sir *Gilbert*'s Debts, and ſettling the Reverſion upon his Kindred and Relations, and that the Truſtees ſhould have no other Benefit ſave only the 20 *l. per Ann.* provided by the Deed it ſelf; there being no mention in the Deed that Sir *Gilbert* intended to do any thing for the Benefit and Advantage of the Truſtees: And ſhould the Truſtees be ſuffered to make Leaſes for 21 Years or *three* Lives according to the Power of the Deed, it will be a vain and idle Proviſion that is made for the Plaintiff for Life, with Remainder to his firſt and other Sons in Tail; for the Truſtees in the laſt Year of the 31 may fill up Eſtates for 21 Years or *three* Lives; ſo that in probability neither the Plaintiff nor any Son of his will have any Benefit by it; and the Court might with Juſtice, when the Plaintiff offered to pay the Debts, reſtrain the Truſtees in their Power to Leaſe: And ſome Proof was offered tending to an ill Practice in Mr. *Entwiſle* in the making and contriving of this Settlement.

Lord Chancellor. Sir *Gilbert* has expreſly given the Surplus of the Profits to the Truſtees, and I cannot take it from them; he might have given his Eſtate to a *Fidler* for a Song: and I know Sir *Gilbert* was in doubt which way to diſpoſe of his Eſtate, and that he had a Perſonal Kindneſs and Friendſhip for ſome of the Truſtees, and no good Opinion of the Plaintiff; and therefore pronounced a Diſmiſſion of the Plaintiff's Bill. But afterwards a Propoſition was made by the Plaintiff's Council, and accepted of by the Defendant, who was then in Court, that the Plaintiff ſhould take upon him the Payment of the Debts reſting unpaid, and ſhould pay the Truſtees for their own Benefit 600 *l.* and they not to account for any Profits already received, and that thereupon the Plaintiff ſhould have the Eſtate and Intereſt of the Truſtees aſſigned unto him.

Earl

Earl of *Winchelſea* verſus *Norcliffe.*

Caſe 410.

19 Februar. *In Court, Lord Chancellor. Maſter of the Rolls. Lord Chief Baron* Atkins. Mr. *Juſtice* Lutwich. *Ante Caſe* 275, 403.

Truſtees of an Infant having ſaved 3000 *l.* out of the Profits of his Eſtate lay it out in a Purchaſe of Lands lying near the Infant's Eſtate, with the Conſent of his Grandmother; Declaring the Truſt for the Benefit of the Infant, if he when at Age ſhall agree to it.

Infant dyes within Age; the Truſtees ſhall account to the Infant's Executors for the 3000 *l.* but the Profits of the Land ſet againſt the Intereſt.

THE Caſe was, that the Truſtees of the Eſtate of *Thomas Wentworth*, an Infant, having a Sum of 3000 *l.* in their hands, which they had raiſed out of his real Eſtate, inveſted the ſame in Lands, which lay commodious to the Infant's Eſtate; and took the Conveyance thereof in their own Names, but thereby declared the Truſt to be for the Benefit of the Infant, in caſe the Infant when he came of Age ſhould accept the ſame at the Rate they had bought the Eſtate, and diſcharge them of the 3000 *l.* and this was done with the Conſent of the Grandmother, who was the Infant's Guardian. The Infant died under Age, and the Queſtion now was, whether the Heir of the Infant ſhould have thoſe Lands, or whether the Purchaſe ſhould be left upon the Hands of the Truſtees, and they to Account to the Adminiſtrator of the Infant for the 3000 *l.*

Mr. Juſtice *Lutwich.* Neither the Heir nor the Adminiſtrator have any Title to the Lands; here was only a bare Election in the Infant, in caſe he had lived to come of Age, and that Election cannot now be made; and therefore he held, that the Truſtees were accountable to the Executor or Adminiſtrator for the 3000 *l.*

Lord Chief Baron Atkins. Of the ſame Opinion.

Maſter of the *Rolls* differed from the Judges, and held that the Heir of the Infant ought to have the Land; and obſerved that the 3000 *l.* was not taken out of the Infant's Perſonal Eſtate, but had been raiſed and ſaved by and out of the Profits of his real Eſtate; and that the Truſtees had acted honeſtly and for the Benefit of the Infant; and that it was but reaſonable they ſhould have ſuch a Power in them: for a Purchaſe of Lands, that lye commodious to a Man's Eſtate, may not be always to

be had; and here being no Creditor in the Caſe, he thought the Heir ought to be preferred before the Adminiſtrator: and took notice of the Caſe of *Dennis* and *Badd* cited at the Bar, where the Committee of an Ideot had bought in a Mortgage that was upon the Ideot's Eſtate, and the Eſtate deſcended to another Ideot; and tho' the Mortgage was kept on foot by an Aſſignment in Truſt, yet in that Caſe it was decreed in a Bill brought by the Committee, that the Lands ſhould go to the Heir, and that the Mortgage ſhould not be taken as Perſonal Eſtate; and an Heir ſhall by the Courſe and Juſtice of this Court have the Perſonal Eſtate applyed in eaſe of the Real, and to diſcharge Mortgages, tho' there be no Covenant for Payment of the Mortgage Money. And in caſe the Truſtees had come to this Court, and ſhewn how it would be for the benefit of the Infant to have had this Money thus laid out, he did not doubt, but that the Court would have decreed it accordingly.

Lord Chancellor concurred in Opinion with the Judges, and held that the Truſtees muſt account for the 3000 *l.* to the Executor; and ſaid there was a plain Difference betwixt this Caſe, and that of *Dennis* and *Badd*; for in that caſe had the Money come to the Hands of the Executor, yet in his Hands it would have been liable in Equity to the Debt due by Mortgage, and the Heir ſhould have compelled him ſo to apply the ſame: ſo that there the Truſtees did no Wrong or Prejudice to the Executor, nor more than what the Executor himſelf might have been compelled to have done. And he did agree that if the Truſtees had come to this Court and had obtained a Decree for the inveſting this Money in a Purchaſe, this Court would have maintained its own Decree: but not having ſo done, but voluntarily put an Election in an Infant, who never made any, he thought they remained accountable for the 3000 *l.* as being part of the Infant's Perſonal Eſtate; and ſaid the matter that had been preſſed at Bar by Mr. Serjeant *Rawlinſon*, had not been anſwered,

viz.

viz. that the Infant at *Seventeen* Years might diſpoſe of his Perſonal Eſtate, tho' he could not of his Real; but if his Truſtees at their Pleaſure might turn and convert his Perſonal Eſtate into a Real, they thereby would debarr the Infant of the Right and Privilege which the Law gave him, and might at their pleaſure advance the Heir, and prevent an Infant from providing for his younger Children, which was unreaſonable; and therefore decreed the Truſtees to pay the 3000 *l.* to the Adminiſtrator, with Intereſt only according to what they had made by the Profits of the purchaſed Lands.

Another matter, which was made a Doubt of in this Caſe was, whether thoſe of the half Blood ſhould have an Equal Share of an Inteſtate's Eſtate with thoſe of the whole Blood; and the Court unanimouſly agreed that thoſe of the half Blood muſt have an equal Share; tho' the *Lord Chancellor* ſaid, that till the Caſe of *Smith* and *Tracy*, 27 and 28 *Car'* 2. at *Doctor's Commons*, they gave but half a Share to one of the half Blood, and it was ſo done in the Caſe of one *Brown*; but ſince the Caſe of *Smith* and *Tracy* that matter has been ſettled; and thoſe of the half Blood have always had an equal Share with thoſe of the whole Blood; and *Cook* upon *Littleton* diſtinguiſhes betwixt thoſe of the half Blood as to Deſcents; but as to Adminiſtration and Perſonal Eſtates they are all one.

Thoſe of the half Blood ſhall ſhare equally with them of the whole Blood in the diſtribution of an Inteſtate's Perſonal Eſtate. *Ante Caſe* 375.

Earl of *Kildare* verſus *Euſtace.*

Caſe 411.
Eodem die.
In Court
Lord Chancellor.
Maſter of the Rolls.
Chief Baron Atkins.

THIS Cauſe ſtanding this Day again in the Paper to be heard, it was inſiſted for the Plaintiff, that let the veſting Point be one way or other, the Plaintiff had a proper Caſe for a Decree; for that he had apparently a Right, at leaſt to one Moiety; and tho' in caſe the Eſtate in Law veſted in the *King*, ſo that his Patentee had a proper Remedy at Law to recover that Right; yet there being a juſt occaſion to come into this Court, (as there was in

Ante Caſe 377. 398. 399. 404.

regard that the Lord *Clare* was the Patentee in Truſt for the Plaintiff) when the Court by that means is poſſeſſed of the Cauſe, and the Right fully examined to here, the the Court will not after that ſend the Plaintiff to Law. This Court never decreed a Suit, when it might decree a Remedy, as in the caſe of a Deviſe of Land, or where a Bond is taken in Truſt and the Truſtee refuſes to let his Name be made uſe of, the Court will decree the Duty, and not an Action to be brought in the Truſtee's Name. And the Defendant *Euſtace* cannot in reaſon oppoſe a Decree; for if the Eſtate in Law be in him, he confeſſes it to be only a Truſt; and if it be not in him, he cannot be prejudiced; for he diſclaims to have any Intereſt: and the Judges in *Ireland* having held, that the Plaintiff could not recover at Law, becauſe the Eſtate in Law was not in the *King*'s Patentee; and the Court of Equity in *Ireland* having refuſed to Decree for the Plaintiff, becauſe they were of another Opinion, and thought the Plaintiff had a proper Remedy at Law; it would be hard for this Court, when they were ſatisfied the Plaintiff had a plain Right, to ſend him to Law. And as to the Objection that it could not properly be tryed here, whether the *Fitzgerrald* that is the *ceſtuy que truſt*, was the ſame Perſon with the *Fitzgerrald* that Forfeited, there was little Reaſon in that Objection. In the Caſe of *Barnewell* and *Rochford*, *Rolls Abridgment* fol. 597. a Tryal was directed touching a Feoffment of Lands in *Ireland*; which certainly was much more Local than the Point in Queſtion.

Lord Chief *Baron Atkins* upon reading the ſecond Act of Settlement was of Opinion, that the Eſtate in Law abſolutely Veſted in the *King*, and not that the Truſt only Veſted; but yet notwithſtanding thought the Plaintiff might have a proper Caſe in Equity, in caſe a plain Right appeared for him: But he now doubted, whether this Court would direct a Tryal, whether the *Fitzgerrald* that was the Nocent or Forfeiting Perſon, and the *Fitzgerrald* that was the *ceſtuy que truſt*, was one and the ſame Perſon.

Maſter of the *Rolls*, as to the veſting Point, thought the Acts of Settlement were not like the Statute of *Hen.* 8. *&c.* and that this Caſe differed from the Lord *Sheffield's* Caſe and *Dowdale's* Caſe, for there the Veſting is for the King's Uſe, but by the Act of Settlement the King was to take nothing to his own Uſe, but was in the nature of a Truſtee, tho' contrary to the general received Opinion, that the King can't be a Truſtee: but in the main he was of Opinion that the Truſt only Veſted. And as to the Queſtion whether the Perſon that Forfeited and the *ceſtuy que truſt* was one and the ſame Perſon, he thought the Evidence was full and plain, that it was the ſame Perſon. In *Forty two* he was Out-lawed by the name of *Fitzgerrald* of *Chriſtian* Town; the Leaſe in Truſt was made by *Fitzgerrald* of *Lady* Town; and the Inquiſition found that *Fitzgerrald* of *Chriſtian* Town was afterwards of *Lady* Town: but in caſe the Court doubted of that Matter, he thought this Court might well direct a Tryal at Law.

Lord Chancellor was ſatisfied, upon peruſal of the Act, that the Eſtate in Law veſted in the *King*; but that the Plaintiff might notwithſtanding be proper for a Decree; and took it, that this Court might very well direct a Tryal, whether the Perſon that Forfeited and the *ceſtuy que truſt* was one and the ſame Perſon; and cited Sir *William Tyrringham's* Caſe, who being ſo powerful that Right could not be had againſt him in the County of *Bucks*, the *Venue* was changed upon a Bill brought here purely for that purpoſe: and he took the Point in this Caſe rather to be, whether there was ground for him to doubt whether it was the ſame Perſon; and therefore declared, in caſe the Defendant would not conſent to try that Matter here, he would Decree it without more ado: and thereupon a Tryal was directed by Conſent to be had in the County of *Salop*: But with this at the Inſtance of the *Chief Baron*, that in caſe the Verdict went for the Plaintiff, it ſhould be without Coſts, but if againſt him he ſhould pay Coſts.

Venue changed upon a Bill brought in this Court for that purpoſe only.

Carpenter

Carpenter verſus *Carpenter.*
Wasborne verſus *Downes.*

Caſe 412.

23 Februar.

In Court, Lord Chancellor.

Common Recovery ſuffered or Fine levied by *ceſtuy que truſt* of an Eſtate Tail has the ſame effect in Equity, as it would have at Law, in caſe the Legal Eſtate was in him.

IN theſe Caſes it was Reſolved, that where a common Recovery is ſuffered or a Fine levyed by *ceſtuy que truſt* in Tail, it ſhall have the ſame effect, and avail as much in this Court, and bind the Truſt in the ſame manner as the ſame would the Eſtate in Law, in caſe he had the Legal Eſtate in him: and as to a Fine, it had never been doubted ſince the Caſe in the Lord *Bridgman*'s time. And it has been held by ſome, that even a Bargain and Sale enrolled by *ceſtuy que truſt* of an Eſtate Tail ſhould bind the Iſſue, in regard that ſuch a Truſt is not within the Statute *de Donis.*

A on his Marriage agrees to ſettle Lands for the Benefit of his Wife and their Iſſue, and afterwards aliens part of thoſe Lands.

Jointreſs decreed to have the deficiency of her Jointure made good out of the Inheritance of the Lands remaining unſold.

But that Decree was Revers'd.

And in the Caſe of *Carpenter* and *Carpenter*, the Huſband upon his Marriage had agreed and given Bond to ſettle particular Lands to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to the Iſſue of that Marriage in Tail; and the Husband having afterwards aliened and ſold part of theſe Lands, the Wife had obtained a Decree in the Lord *Nottingham*'s time to have the full Value of the Eſtate ſhe was to have for her Life, ſupplied and made good to her out of the Lands remaining unſold, and that the Inheritance of thoſe Lands ſhould be ſubjected thereunto: Now upon a Rehearing the *Lord Chancellor* Reverſed that part of the Decree, for the Jointreſs and Children are equally Purchaſors; and the Wife muſt not have all and leave nothing for the Children, but they muſt bear the Loſs in proportion; and ſo in any Caſe where the Iſſue and Jointreſs claim by the ſame Settlement, if there be a Prior Incumbrance, the Jointreſs ſhall contribute and bear her Proportion, and not hold over and lay the whole Burthen upon the Heir.

Where the Jointreſs and the Iſſue claim by the ſame Settlement, they ſhall contribute proportionably in the diſcharge of any Prior Incumbrance on the Eſtate.

Pitt

Pitt verſus Earl of *Arglaſs.*

Caſe 413.
24 Februar.
In Court, Lord Chancellor.

THE Plaintiff having brought a Bill of Review to reverſe the Decree obtained by the Defendant, the Defendant demurred thereunto; and the Plaintiff being ſatisfied that the Opinion of the Court would be againſt him, moved, that he might diſmiſs his Bill, and obtained leave to make the Motion when the Demurrer came to be argued; and now moved accordingly: But the Court denyed the Motion, and allowed the Demurrer: and ſo the Plaintiff was catched, who deſigned only Delay; but was now barred from bringing any new Bill of Review. At Law after Errors aſſigned the Court will not give leave to diſcontinue a Writ of Error.

A Man can't bring a new Bill of Review after a Demurrer allowed to a former Bill of Review.

Ante Caſe 124, 126.

Trinity College in *Cambridge* verſus *Browne.*

Caſe 414.
Eodem die.
In Court, Lord Chancellor.

THE Bill was to diſcover the beſt Beaſt of *ceſtuy que truſt* of a College Leaſe: The Defendant demurred, for that the beſt Beaſt of the *ceſtuy que truſt* could not be taken for a Herriot; and it alſo appeared of the Plaintiff's own ſhewing that the Tenants, who had the Eſtate in Law in them, were yet living. The Demurrer was allowed.

An Herriot is not due upon the Death of *ceſtuy que truſt*, but of him that has the Legal Eſtate.

Parry verſus *Rogers.*

Caſe 415.
Eodem die.
In Court, Lord Chancellor.

THE Bill was to examine Witneſſes, to preſerve their Teſtimony touching the Title of certain Lands in the Bill mentioned. The Defendant demurred, becauſe there was no Impediment that hindred the Plaintiff from trying his Right at Law; and that he had not obtained any Verdict in Affirmation of his pretended Title. Demurrer allowed.

A Man cannot bring a Bill to examine Witneſſes in *perpetuam rei Memoriam* to eſtabliſh his Title, until he has made it good by a Verdict at Law; if he is under no Impediment of trying his Title at Law.

Lecone verſus *Sheires.*

Caſe 416.
Eodem die.
In Court Lord Chancellor.

A indebted to *B*, by Deed grants the Guardianſhip of his Child to *A*, and covenants not to revoke it, and dies. Equity will not ſet aſide the Deed unleſs the Debt be paid, or the Truſt abuſed.

THE Father of the Plaintiff the Infant being indebted to the Defendant, by Deed granted him the Guardianſhip of his Children, with a Covenant not to revoke the Deed, and gave a Bond of 500 *l.* Penalty to perform Covenants. The Bill was to bring the Guardian to an Account, and to remove him: And tho' the Guardian being preſent in Court produced the Deed, and was ready to deliver up the ſame, in caſe the Court ſhould ſo order or direct; Yet in regard there was a juſt Debt owing to the Defendant from the Father of the Infant, the Court declared they would not reſtrain the Guardian from receiving the Rents and Profits of the Infant's Eſtate, but only from abuſing his Perſon.

Note, The Statute is, that the Father may by Deed grant the Guardianſhip of his Children from time to time. *Vid. Stat'* 12. *Car'* 2. *Cap.* 24. *Sect.* 8.

Addiſon verſus *Hindmarſh.*

Caſe 417.
Eodem die.
In Court Lord Chancellor.

The Defendant pleaded himſelf Heir on the Part of the Mother, and did not ſay he was Heir of the whole Blood.
Plea over-ruled

THE Bill was to be relieved touching certain Lands which the Plaintiff claimed Title to, as Heir on the Part of his Father. The Defendant pleaded that the Mother was the Purchaſor of thoſe Lands, and that the Defendant was Heir on the Part of the Mother; but it not being pleaded, that the Defendant was Heir of the whole Blood to the Mother, (and in Fact he was only of the half Blood to the Mother) for that reaſon the Plea was overruled.

Upon a Bill of Appeal from an Inferior Court you need not aſſign particular Er-

Note, In a Bill by way of Appeal from an Inferior Court, the Plaintiff therein muſt complain of the Injuſtice done him by the Inferior Court; but is not obli-

ged to assign any Particular Errors; which is the difference betwixt a Bill of Appeal and a Bill of Review: But in this they agree, *viz.* that both must be upon the same Evidence; and you cannot examine *de novo*; tho' in the Spiritual Courts they examine over and over again, and proceed upon new Allegations.

rors, as you must do upon a Bill of Review.

But you can't examine *de novo* upon either of those Bills.

Tho' in the Spiritual Court they examine over and over again upon new Allegations.

And the *Lord Chancellor* seemed to incline that a Bill of Appeal would lye from an Inferior Court to the Court of *Chancery*, as at common Law the *King's Bench* corrects all inferior Courts.

Note that from the Court of Equity at *Lancaster*, an Appeal by Act of Parliament lies to the *Dutchy* Court.

An Appeal lies to the *Dutchy* Court from the Court of Equity at *Lancaster*.

Englefeild versus *Englefeild.*

Case 418.
1 Martij.
In Court Lord Chancellor.

If a contingent Remainder is destroyed by a Legal Conveyance, and that Conveyance is obtained by Fraud, Equity will relieve against it.

Post Case 419.

SIR *Thomas Englefield*, the Plaintiff's Father, was seized of an Estate for his Life in the Reversion of two Estates, the one in *Leicestershire*, and the other in *Wiltshire*, each of about the Value of 1800 *l. per Ann.* expectant upon the death of two Jointresses, Remainder to his first and other Sons in Tail, Remainder in like manner to his next Brother the now Defendant; and tho' he was thus intitled to the Reversion of these great Estates expectant on the death of the Jointresses, (Sir *Robert Howard*'s Lady having all the *Wiltshire* Estate in Jointure, and Dame----- *Englefeild* all the *Leicestershire* Estate in Jointure to her) yet he had little or nothing in present, and had been some time in Prison for Debt; and having formerly been married, but never had any Issue, and being sixty Years old, and not intending to marry again, the *Wiltshire* Estate was sold to Sir *Robert Howard*, and out of the Purchase Money 2500 *l.* was paid to the Defendant for his Interest therein. And the now Defendant agreed with Sir *Thomas Englefeild*, his elder Brother, to pay him down in hand 600 *l.* and to pay him 500 *l. per Ann.* during his Life,

Life, to commence from the Death of the Lady *Englefield* the Jointreſs, whoſe Eſtate the Defendant alſo bought in (for without her, the Plaintiff's Father having barely an Eſtate for Life expectant on her Death, he could not make a good Tenant to the Precipe) and after ſeveral Treaties had, at laſt a Final Agreement is made (wherein Sir *Jeffery Palmer* was conſulted) between the two Brothers upon the Terms aforeſaid, and Lady *Englefield*'s Eſtate being bought in, a common Recovery was ſuffered, and Fines levied, and the Defendant was in actual Poſſeſſion of the Eſtate. After this Sir *Thomas* marries a young Wife, and by her in his old Age has Iſſue the now Plaintiff, and then brought a Bill in the Lord *Keeper Bridgeman*'s time to be relieved againſt this Agreement, and the Conveyances made purſuant thereunto; thereby ſuggeſting, that he was defrauded and circumvented; which Bill was to the ſame effect with the Plaintiff's now Bill: and upon a ſolemn Hearing that Bill was diſmiſſed.

And for the Defendant it was now ſtrongly inſiſted, that altho' the Plaintiff comes in as a Remainder-Man, ſo that in ſtrictneſs a Diſmiſſion of the Plaintiff's Father's Bill is not pleadable in barr to the now Plaintiff's Bill; yet certainly, if there were not ground to relieve the Father, the now Plaintiff cannot be relieved upon any Pretence of Fraud, which was perſonal: and if any Fraud was done to any one, it was to the Father, and not to the Plaintiff; who was not then in being; nor was his Eſtate of any Conſideration in the Law; but was purely contingent, and well and ſufficiently deſtroyed by the common Recovery before the Plaintiff was born. That the Contract and Agreement was made by the Conſent of all the Friends and Relations, and with great deliberation; Sir *Jeffery Palmer* having been all along conſulted in it, and done by his Advice, and was reaſonable and natural; Sir *Thomas* being then *Sixty* Years of Age, never having had any Child, tho' formerly married, and then a Widower, and wanted a preſent Subſiſtance. That the Badges of Fraud aſſigned by the Plain-

Plaintiff, received, as they thought, a clear Anſwer, and were in Iſſue in the former Cauſe; and now after *twenty* Years Enjoyment under this Agreement and Purchaſe, it was inſiſted, there was little Ground for the Plaintiff to deſtroy it upon pretence of Fraud, when the Fraud, if any, was in relation to the Plaintiff's Father only, whoſe Bill was diſmiſſed; and the Plaintiff's Contingent Eſtate well and ſufficiently deſtroyed by a legal Conveyance: and his Father might, if he had pleaſed, have given this Eſtate to his Brother, and the Plaintiff could never have avoided it.

The Court was of Opinion, upon the reading of the Articles, that this Conveyance was obtained by Fraud: and as to the Objection that the Plaintiff's Eſtate was contingent and abſolutely deſtroyed by a legal Conveyance, that would not be material; for if the Conveyance was obtained by Fraud, it was the ſame in Equity, as if no Conveyance had ever been made; and therefore declared they would decree it for the Plaintiff, unleſs better Cauſe was ſhewn.

DE

Termino Paſchæ,

3 *Jacobi II.* 1687.

In Curia Cancellariæ.

Caſe 419.
6 Aprilis.
In Court, Lord Chancellor.
Ante Caſe 418.

Englefeild verſus *Englefeild*

THIS Cauſe ſtanding this Day again in the Paper, the Defendant's Council applyed themſelves principally to Anſwer the Objections made in relation to the pretended Badges of Fraud, and obſerved that whether Sir *Thomas* the now Plaintiff's Father was barely Tenant for Life without any Remainder to his Iſſue, or whether there was a Remainder to his firſt and other Sons in Tail, depended only on the Re-publication of a Will, which was in the Power of Sir *Robert Howard* to make it a Will or no Will; and the Title was thought ſo doubtful, that the Point upon the Re-publication was afterwards tryed at the Bar; but that Sir *Thomas* was fully informed and apprized of his Eſtate by the Will, ſuch as it was; and it is fully proved in the Cauſe, that the firſt Agreement, which was 18 *Decembris*, was for 600 *l.* and 200 *l. per Ann.* and it was then ſo far from being apprehended, that the Defendant had any extraordinary Bargain of it, the Plaintiff's Father being then above 60 Years of Age, and not like to have Iſſue, that he reſerved a Latitude to go off; and

and then *Smith* finding the Defendant ſo indifferent in this matter, comes in, firſt for a Third, and then for a Moiety. After all this they come to a new Agreement; the 200 *l.* is paid, and there are Covenants for further Aſſurance, and new Deeds executed, and after all this a Releaſe given. And as to the Objection, that the Conſideration of the ſubſequent Articles of the *twenty firſt* of *September* was mentioned to be, amongſt other things, that the Defendant releaſed his Pretenſions to the *Wiltſhire* Eſtate, it appeared that they were in time ſubſequent to the Articles of the *twenty firſt* of *September*.

As to that it was anſwered, that the Articles of the *twenty firſt* of *September* were antedated, that they might over-reach *Smith*, and cut him out of his Moiety; but were not in Fact executed, as fully appeared in the Cauſe, till after that the Defendant had releaſed his Pretenſions to the *Wiltſhire* Eſtate; and that the Diſmiſſion of the Plaintiff's Father's Bill, was there nothing elſe in the Cauſe, anſwers all thoſe matters. And it was obſerved that the Plaintiff had very little Ground to ſtand upon, and a very ſlender, if any, Foundation to raiſe an Equity upon; for as to an Eſtate in Law, he had none, no not ſo much as a Right; there was never any thing more than a Contingency limited to him, and that fully deſtroyed by a legal Conveyance before he was born; and yet in reſpect of that alone it is, that he would be now relieved upon a ſuppoſed Fraud done in the obtaining a Conveyance in prejudice of this imaginary Eſtate of his, when his Father that had a real Eſtate could not be relieved: and it was inſiſted, that a Diſmiſſion upon hearing of the Merits of a Cauſe was as pleadable as a Decree; and the Plea in this Caſe was diſallowed barely upon the Account, that the Plaintiff did not come in under his Father's Title, but as a Remainder Man. In the Caſe of *Roſcarrocke* and *Barton*, Tenant for Life with a Remainder to another in Tail was forecloſed; and after *Sixteen* Years time the Remainder-Man came to redeem, but was diſmiſſed; for otherwiſe there

there would be no end of Suits: as in this Caſe, if Sir *Thomas* had ſeven Sons, they would have all had ſeveral new ſpringing Equities. But the Court varied not in Opinion, and therefore decreed a Reconveyance and an Account of Profits.

Holford verſus *Burnell.*

Caſe 420.
18 Aprilis.
In Court, Maſter of the Rolls.

A Defendant held to the Offer in his Anſwer, tho' the Circumſtances of the Caſe were varied from what they were at the time when the Anſwer was put in.

THE Plaintiff's Bill was, that the Defendant might redeem or be foreclоſed. The Defendant by Anſwer confeſſed the Plaintiff's Mortgage, and that he (the Defendant) having the Equity of Redemption aſſigned to him, the better to ſecure a Debt owing to him by the Mortgagor, offered to pay the Plaintiff what was due on his Mortgage. This Cauſe reſted thus for ſome time; and afterwards the Mortgagor being abſconded, a Bill was brought by ſeveral of his Creditors againſt the Plaintiff Mr. *Holford* and others, and in that Caſe it appeared that the Lands mortgaged to Mr. *Holford* were ſubject to a Mortgage prior to his, and that the Mortgagor had made a Deed of Truſt of thoſe Lands amongſt others for Payment of his Debts; and upon hearing of that Cauſe it was decreed that the now Plaintiff ſhould be only paid in Proportion with the other Creditors; and not liking that Decree he brought this Cauſe to hearing on Bill and Anſwer; and in regard the Lands by the Deed of Truſt were ſubjected to the Payment of more Debts than the ſame were worth to be ſold, the Defendant would now go back from the Offer in his Anſwer, and be contented to be foreclоſed.

And it was ſtrongly inſiſted for the Defendant, that he ought not to be ſo bound by this Offer in his Anſwer; but that he might notwithſtanding wave it; he being content to be foreclоſed; and the rather for that ſince the Anſwer put in, the Original Cauſe was heard, and decreed that the now Plaintiff ſhould be paid but in Proportion with the other Creditors; and now by bringing on

on the Croſs Cauſe upon Bill and Anſwer, the Plaintiff would vary the Decree made in the Original Cauſe; and that the Circumſtances of the Caſe were now much altered and varied, from what they appeared to be in the Croſs Bill, and from what was known at the time of the Anſwer put in: and the Plaintiff could not have a Decree beyond his own Bill, which was only that the Defendant might redeem or be foreclоſed: But notwithſtanding this the *Maſter* of the *Rolls* held the Defendant to the Offer in his Anſwer, and decreed him to pay the Mony due to the Plaintiff.

Dorrington verſus *Jackſon* and *Watſon.*

Caſe 421.

Eodem die.

In Court Lord Chancellor.

A recovers Judgment againſt *B*, and has a Leaſe ſold to him by the Sheriff; *C* the Ground Landlord enters, and having Judgment in Ejectment for Non Payment of the Ground Rent, offers *A* upon Payment of Arrears of Rent and Coſts at Law to make him a new Leaſe for the Remainder of the Term. *A* refuſing this Offer, *C* lets it to another. *A* brings his Bill to be relieved againſt the Recovery and Forfeiture at Law, having firſt tendered the Arrears and Coſts.

Bill diſmiſſed with Coſts.

HIND and his Wife, who was the Widow and Adminiſtratrix of *Colvile*, being poſſeſſed for Years of a Meſſuage called the *three Tunns* in *Lombard* Street; the fore Part by Leaſe from Sir *Chriſtopher Buckle* under a Ground Rent of *ten pounds per Ann.* and the back Part by Leaſe from the Defendant *Jackſon* at a Ground Rent of 5 *l. per Ann.* the Plaintiff *Dorrington* brings an Action againſt them at Law for a Debt owing by the Inteſtate *Colvile*; whereunto they appeared; and *Hind* becoming a Bankrupt, and he and his Wife abſconding, the Plaintiff obtains Judgment againſt them at Law by Default, and upon a *venditioni exponas* has theſe Terms for Years ſold unto him by the Sheriff: But pending that Proceeding at Law, *Buckle* and *Jackſon*, the Head Landlords, entered for Non-Payment of Ground Rent, and obtained ſeveral Judgments in Ejectment. *Dorrington* agrees with *Buckle* and pays him his Rent in arrear, with his Coſts and Charges at Law, and accepts a new Leaſe of him for the Reſidue of the Term then to come; and by a Writ of Poſſeſſion upon the Judgment recovered by *Buckle* is put into Poſſeſſion of the fore Part of the Meſſuage; and having thus *Buckle*'s Intereſt, he apprehended that *Jackſon* could not diſpoſe or make any Benefit of his back Part of the Meſſuage, and therefore refuſed to agree with him on the ſame Terms as he had with *Buckle*, and inſiſted

ſiſted to have Abatements of the Ground Rent in Arrear, *&c.* and pretended that the Back Houſe would be of little Uſe to him, and that he was very indifferent whether he had it at the Ground Rent or not: *Jackſon* hereupon agrees with the other Defendant *Watſon*, who was Tenant to *Jackſon* of a Meſſuage in *Cornhill* which adjoyned to the back part of the *three Tunns*, (the Ground on which that back Part was built having formerly belonged to this Meſſuage,) to lay this back Part of the *three Tunns* to the Meſſuage in *Cornhill*, and for that Purpoſe they beat down a Wall and make a Door into the back Part of this Meſſuage, and by nailing up the Doors divide it from the fore Houſe. *Dorrington* being thus diſappointed of bringing *Jackſon* to his own Terms indicts him and *Watſon* for a forceable Entry; but they were acquitted, and having tryed (but without Succeſs) other means at Law to get the Poſſeſſion of this back Houſe, at laſt tenders the Ground Rent in Arrear and the Coſts and Charges at Law, and upon Refuſal of that brings his Bill to be relieved againſt the Re-entry and Forfeiture at Law.

Upon the hearing of the Cauſe the Caſe appearing to be *ut ſupra*, and it being fully proved in the Caſe that *Jackſon* had offered the Plaintiff to accept of the ſame Terms as Sir *Chriſtopher Buckle* had agreed to, and that the Plaintiff refuſed to comply with that Offer, and would not pay all the Ground Rent in Arrear with the Defendant's Coſts and Charges at Law; and that before the Bill brought *Jackſon* had actually let this back Part to *Watſon*, who had been at a conſiderable Charge in the fitting this back Houſe for his Conveniency, the Court would not therefore now relieve the Plaintiff, but diſmiſſed his Bill with Coſts to be aſcertained by the Defendant's own Oath.

This Cauſe was afterwards reheard, and the former Decree confirmed *in Omnibus*.

Tooke verſus Sir *Robert Atkins & al'.*

Caſe 422.
19 Aprilis.
In Court Lord Chancellor.

THE Plaintiff's Mother being very intimate with the Defendant Sir *Robert Atkins*, and deſigning to make an Advantage by the Marriage of the Plaintiff her Son, who was Heir to a good Eſtate, an Agreement was made between the Plaintiff's Mother and Sir *Richard Atkins*, whoſe Daughter the Plaintiff married, that Sir *Richard* ſhould pay 2000 *l.* for the Uſe and Benefit of the Plaintiff's Mother, and nothing of a Portion was paid or intended for the Plaintiff; and 1800 *l.* of this Money having come to the Hands of the Defendant Sir *Robert Atkins*, a Truſtee for Mrs. *Tooke*, unto whom or for whoſe Uſe the Defendant Sir *Robert* had long ſince paid the ſame; the Plaintiff's Bill was to have this Money anſwered and made good to him, he having no other Portion with his Wife.

The Defendants by Anſwer inſiſted that this Money was intended for the Uſe and Benefit of the Mother, and not for the Plaintiff, and the Writings ſeemed to import as much; and the Defendant's Council inſiſted on the Caſe of *Greyſly* and *Lother* in *Hob. fo.* 10. where it is adjudged to be a ſufficient Conſideration to maintain an Action that the Mother would give her Conſent to the Marriage of her Child: But Sir *Richard Atkins* being examined in the Cauſe, and in effect depoſing that this Money was intended as a Portion with his Daughter, the *Lord Chancellor* decreed for the Plaintiff, and that in the firſt place the Mother ſhould pay as far as ſhe was reſponſible, and Sir *Robert Atkins* the Reſidue; but both to be liable to ſatisfie the Monies to the Plaintiff.

Glover

Glover verſus *Faulkner.*

Caſe 422.
25 Aprilis.
In Court Lord Chancellor.

Altho' it is an Order of Courſe to examine a Defendant *de bene eſſe* ſaving juſt Exceptions, yet when the Cauſe is heard and it appears ſuch Defendant is a party intereſted, it is proper to ſhew Cauſe againſt ſuch an Order before the Witneſſes be examined.

THIS Cauſe having been heard and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants *de bene eſſe*, which was ordered, unleſs Cauſe. The Defendant's Council coming this Day to ſhew Cauſe, took this Difference, that altho' it was an Order of Courſe to examine a Defendant *de bene eſſe*, ſaving juſt Exceptions; yet when the Cauſe was open, and it appeared that the Defendants were Parties intereſted, it was proper to ſhew Cauſe againſt ſuch an Order before the Witneſſes were examined; which Difference was allowed to be well taken: but it appearing that Releaſes were given to the Defendants, and the Matter to be examined to being only matter of Account, the Cauſe was diſallowed.

Wardour & Ux' verſus *Berisford & Ux'.*

Caſe 423.
26 Aprilis.
In Court Lord Chancellor.

An Account touching a Perſonal Eſtate being decreed, the Defendant endeavoured to charge the Plaintiff with a great Debt due to the Eſtate; but Defendant having opened a Bundle of Papers relating to that Demand, which had been ſealed up, and left in his Hands, the Defendant's Demand was for that Reaſon diſallowed.

THE Plaintiff and Defendant having married two Daughters of *I S*, upon his Deceaſe there were ſome looſe Papers, that concerned the Account between the Plaintiff and his Father-in-Law, put up together in a Bundle, and covered with a Paper tied up with a Tape, and ſealed by two Perſons then preſent, and delivered to the Defendant *Berisford* to be ſafely kept, being then told they were Matters of Concern: And there being now an Account directed of the Eſtate of *I S*, which was to be equally diſtributed between the Plaintiff and Defendant, the Defendant demanded as due from the Plaintiff to his Father-in-Law for Diet, *&c.* 2300 *l.* But upon Proof made that the Defendant had altered the Bundle of Papers ſo ſealed up, and diſplaced them, and that it could not be known what Papers might have been taken out, and the Maſter having reported that the Defendant had

ſup-

ſuppreſſed the Evidences, the Court for that Reaſon diſallowed the Defendant's whole Demand againſt the Plaintiff, tho' the Defendant ſwore he had produced all the Papers, and tho' the Papers produced appeared to be half-yearly Accounts, and related one to the other, and not one miſſing, but the Account was thereby carried down within a little time before the Teſtator's Deceaſe; and tho' the *Lord Chancellor* declared himſelf ſatisfied that all the Papers were produced, yet for the Reaſon aforeſaid wholly diſallowed the ſaid Demand.

Caſe 426.
30 Aprilis.
Lord Chancellor.
Ante Caſe 80.
Poſt Caſe 436. 453.
2 Ch. Rep. 145.
2 Vent. 358

Noel verſus *Robinſon.*

BY the Defendant's Council it was inſiſted, that by the Cuſtom of the Iſland of *Barbadoes* a Plantation there, tho' it be a Fee Simple Eſtate, is in the firſt Place liable to the Payment of Debts; ſo that the Owner cannot by his Will ſo deviſe his Plantation, but that the ſame will be liable to the Payment of his Debts: But theſe Debts muſt be either Debts contracted on the Place, or Debts contracted in *England* or elſewhere for matters relating to the Plantation, *&c.*

And Mr. Serjeant *Maynard*'s Caſe was cited, who recovered a Debt contracted here againſt the Executor of an Owner of a Plantation in *Barbadoes*, and by his Advice an Action of *Trover* was brought, and Judgment obtained for the *fourth* Part of a Negroe.

But the principal Point intended was, whether the Defendant *Robinſon*, who was the Executor of Sir *Martin Noell*, who had deviſed this Plantation to his Children, having made a Leaſe of this Plantation reſerving the Rent to himſelf, but had therein declared that the ſame was in Truſt for the Children of Sir *Martin Noell*, who were the Legatees, was ſuch an Aſſent to a Legacy, as ſhould be binding to the Executor, ſo as that he ſhould not have Relief againſt the ſame, as to Debts by him afterwards paid.

And it was inſiſted for the Defendant, that ſuch an Aſſent to a Legacy is no ways binding, as to a Creditor, the thing it ſelf remaining in Specie; but in caſe the Plantation had been afterwards ſold, it might have been otherwiſe. And then as it would not bind the Creditors, ſo it would not in Equity be binding to the Executor himſelf, as to ſuch Debts as were by him afterwards paid; for as to thoſe Debts he ſtood in the Place of the Creditors,
1 Ch. Rep. 148. and had their Equity; and the Caſe of *Huttoft Grove* verſus *Banſon* and his Wife and *Thomas Grove*, decreed the *fourteenth* of *December* 1669, was cited, where one *Huttoft* by his Will deviſed 5000 *l.* to the Plaintiff, and *five hundred Pounds* to the Plaintiff's Siſter, (who afterwards married *Banſon*) and made Defendant *Thomas Grove* his Executor; and upon the Treaty of that Marriage the Executor agrees that there was 500 *l.* and Intereſt due for the Legacy, and that he would make that up 1000 *l.* and enters into a Statute for Payment, and alſo aſſigns the Equity of Redemption of a Mortgage for further Security, and dies, having much waſted the Teſtator's Eſtate, and without Aſſetts ſufficient to make Compenſation. And the Plaintiff's Bill was, that *Banſon* might have his 500 *l.* Legacy only in Proportion with him, and it was ſo decreed accordingly, and the Plaintiff was preferred as to the Redemption of the Mortgage, he having 5000 *l.* Legacy,
1 Ch. Rep. 135. and the Defendant but 500 *l.* And a like Caſe of *Nelthorpe* and *Biſcoe*, where a Legatee had actually received her Legacy at the time it became payable, and the Eſtate afterwards by Caſualty proving deficient to anſwer the other Legacies, which were not then payable, was made to refund: and
1 Ch. Rep. 256. the Caſe of *Chamberlain* and *Chamberlain*, decreed the 26th of *July* 1664, that an Aſſent to a Legacy ſhall not bar a Creditor, where the thing it ſelf is remaining in Specie. And in the Caſe of *Catchmay* and *Nicholls*, where a Woman that had the Uſe of a Perſonal Eſtate deviſed to her for Life, with a Remainder over to another, had changed the Securities and taken new Bonds in her own Name, it was determined that *that* ſhould not be conſtrued to be

be a *devaſtavit*, or make her Eſtate any way liable; and that the Executor in that Caſe was but in the Nature of a Truſtee, and was not to be puniſhed, where the Deviſee had acted fairly, and done nothing againſt good Conſcience. And beſides in the principal Caſe the Aſſent inſiſted upon is not properly ſpeaking an Aſſent to a Legacy; for the Deviſe is of no leſs than the whole Inheritance.

Lord Chancellor. It is a Caſe of Conſequence, and it will be fit therefore it ſhould be well inquired into, how far a Plantation in *Barbadoes* is liable to the Payment of Debts: But as to the actual Aſſent to a Legacy by an Executor, *that* would not bind a Creditor. If an Executor ſhould releaſe a Debt of 100 *l.* for *One Shilling*, *that* would not bind a Creditor: But in caſe there is no other Creditor, ſave only the Executor himſelf, there his Aſſent will be binding to him; as if an Executor will voluntarily releaſe a Debt, he ſhall not be relieved againſt it, though a Creditor ſhould.

Sagitary verſus *Hyde.*

Caſe 427.
2 Maij.
In Court, Lord Chancellor.

A Man makes a Settlement on one of his Co-Heirs, with a Power of Revocation; the Heir, either before Original filed or Bill brought, aliens; but before all the Purchaſe Money is paid, an Original is filed and a Bill brought, and Notice thereof is given to the Purchaſor.

Per Cur'. There is a Difference between a Conveyance with a Power of Revocation, and a Conveyance to ſuch Uſes as a Man ſhall appoint, and he afterwards by Will appoints the Uſes.

In the Principal Caſe there being a Debt owing to the King it was ordered that the King's Debt ſhould be ſatisfied out of the Real Eſtate, that the other Creditors might be let in to have a ſatisfaction of their Debts out of the Perſonal Aſſetts.

Scudemore

Caſe 428.
3 Maij.
Lord Chancellor.

Scudemore verſus *White.*

THE Statute of *Limitations* is no Plea in Bar to an open Account.

Caſe 429.
Eodem die.
In Court, Lord Chancellor.
Where one Obligee is ſued, by the Cuſtom of *London* his Co-Sureties ſhall contribute.
So by the Cuſtom of *London* where a Surety pays a Debt, he ſhall maintain an Action againſt the Principal, tho' he has no Counter-Bond.

Layer verſus *Nelſon.*

WHERE one Obligee that is a Surety is ſued alone, by the Cuſtom of the City of *London* he ſhall make his Co-Sureties contribute: ſo where a Surety pays a Debt, and has no Counter-Bond, by the Cuſtom of the City of *London* he ſhall maintain an Action againſt the Principal.

Caſe 430.
4 Maij.
Lord Chancellor.
A Feme Covert after the Death of her Husband bound by an Incloſure, to which he had agreed, it appearing that her Eſtate was much improved by the Incloſure, and that by diſturbing it ſhe aimed at an unreaſonable Advantage to her ſelf.

Rothwell verſus *Widdrington.*

A Decree was made for an Incloſure 20 Years ſince, to which the Defendant the Lady *Widdrington's* Husband had agreed in his Life-time, and ſhe having an Eſtate of about 25 *l. per Ann.* within the Manor, would now diſturb the Incloſure: And tho' in ſtrictneſs her Huſband's Conſent could not bind her Intereſt, yet it being proved in the Cauſe, that her Eſtate was much improved by the Incloſure, and that ſhe deſigned only to make an unreaſonable Advantage to her ſelf: The Court decreed the Incloſure ſhould ſtand.

Caſe 431.
Eodem die.
In Court, Lord Chancellor.
Relief denied againſt the Breach of a Condition in a Voluntary Settlement.

Longdale verſus *Longdale.*

THE Father makes a Voluntary Settlement upon his eldeſt Son in Tail Male, Remainder to a ſecond Son, *&c.* in which is a Proviſo, that if his eldeſt Son did not pay the ſecond Son 600 *l.* at his Age of 21 Years, that then the Eſtate of the eldeſt Son both in Law and Equity ſhould ceaſe. The Father having afterwards married a ſecond Wife, by Deed taking notice of the former Settlement, and

that

that his Son had not paid the Money according to the Proviſo, conveys the ſame Lands to the Uſe of his Children by his laſt Wife.

The Plaintiff's Bill was to be relieved againſt the Forfeiture for Non-payment at the preciſe Day: But in regard the Conveyance was purely Voluntary, and the Father might have put what Conditions or Reſtrictions upon his Son, he thought fit; and the Proviſo being Special, that for Non-payment at the Day the Son's Eſtate both in Law and Equity ſhould ceaſe, the Court refus'd to relieve the Plaintiff, and diſmiſſed the Bill; and the rather for that the Plaintiff had ſet up a Releaſe againſt his Father, which was obtained by Surprize; and the Deed in Law was defective, and amounted only to a Declaration of Truſt.

Eyles verſus *Cary.*

Caſe 432.
6 Maij.
Lord Chancellor.

THE Caſe aroſe on a Will, wherein was this Clauſe, *viz. I Will all my Debts ſhall be paid before any of my Legacies or Gifts herein after mentioned*; and then deviſes ſeveral Pecuniary Legacies; and after in the ſame Will deviſes Lands to *J S*, on Condition to pay a certain Rent to *J N*; and other Lands to *J S*, on Condition to pay 5 *l. per Ann.* to *J D*. The Queſtion was whether theſe Lands were by the Will ſubjected to the Payment of the Teſtator's Debts, or only to the Payment of the particular Rents thereout deviſed.

Per Cur'. The Lands are not ſubjected to the Payment of the Teſtator's Debts; the general Clauſe in the beginning of the Will ſhall be intended only of the Perſonal Eſtate, and the Pecuniary Legacies thereout deviſed.

Surrey verſus *Smalley.*

Caſe 433.
Eodem die.
Lord Chancellor.

A Judgment confeſſed by an Executor pending a Bill here ſhall not be allowed upon an Account of Aſſets.

A Judgment confeſſed pending a Bill here not allow'd in an Account of Aſſets.

Caſe 434.
7 Maij.
Lord Chancellor.

Parker verſus *Turner.*

Copyholder in Tail takes a Conveyance of the Freehold in Fee. The Copyhold is Merged.
2 *Chanc. r.* 174.
Ante Caſe 364.

THE Queſtion was, whether Tenant in Tail of a Copyhold having taken a Conveyance in his own Name of the Freehold in Fee, the Copyhold Eſtate was thereby Merged. The *Lord Chancellor* ſeemed to make little doubt but that the Copyhold was Merged, tho' it was ſaid this Point was depending upon a Special Verdict at Law.

DE
Term. S. Trinitatis,

3 *Jacobi II.* 1687.

In Curia Cancellariæ.

Selfe verſus *Madox & al'.*

Caſe 435.
26 Maij.
In Court, Lord Chancellor.
A being decreed to pay a Sum of Money, or deliver Poſſeſſion of a Houſe to *B* by a certain Day, conveys the Houſe to a Creditor in ſatisfaction of a real Debt. This ſhall not defeat *B* of the Benefit of the Decree.

THE Defendant *Madox* was decreed to pay the Plaintiff a Sum of Mony, or deliver up Poſſeſſion of a Houſe and Lands in *Edmonton*; and upon the Defendant's Examination on Interrogatories touching a Contempt in not performing the Decree, it came out that the Defendant had made an Aſſignment to a real Creditor by Bond of this Houſe and Lands for ſatisfaction of his Debt, and that this Aſſignment was made by *Madox* of his own free Will, without the Privity or Knowledge of the Creditor, not only pending the Suit, but even after the time firſt ſet for Payment of the Money or delivering of the Poſſeſſion was expired, which Time *Madox* had got enlarged on Motion, with deſign in the mean time to make this Conveyance.

The Queſtion was, whether this Aſſignment made by *Madox* ſhould defeat the Plaintiff of the Benefit of the Decree.

The Court decreed the Poſſeſſion of the Houſe and Lands to be delivered to the Plaintiff, without any regard had to this Conveyance; and the Caſe of *Goldſon* and *Gardiner*

Gardiner in 1680, was cited, where the Court had made the like Decree in the caſe of a Conveyance made from the Father to the Son, Prior to the Decree, but pending the Suit.

Noell verſus *Robinſon.*

Caſe 436. Eodem die. *Lord Chancellor.* *Ante Caſe* 80. 426. *Poſt Caſe* 453.

THIS Cauſe coming on this Day again for his Lordſhip's Opinion, he inclined to Decree it for the Plaintiff; and declared that where an Executor has aſſented to a Legacy, he ſhall never afterwards avoid it, tho' a Creditor in ſuch Caſe may make the Legatee refund: and as touching the making a Plantation in *Barbadoes* liable to a Debt contracted here, it was ſaid, the Method was by a Procuration from hence under the Seal of the Mayor of *London*, and getting that Recorded there; or an Acknowledgment of the Debt by the Owner of the Plantation upon the Place will do it.

How a Plantation in *Barbadoes* may be made liable to a Debt contracted in *England.*

Newton verſus *Rowſe.*

Caſe 437. 30 Maij. *Lord Chancellor.*

THE Defendant was Executor of one *Child* an Attorney, with whom, when he lay ill of the Sickneſs whereof he afterwards died, the Plaintiff placed his Son, and gave 120 *l.* with him; and Articles were made and Executed, by which it was provided, that in caſe *Child* died within one Year, that then 60 *l.* of the Mony ſhould be returned. It happened that *Child* never recovered, but died within *three* Weeks after ſealing of the Articles, and Payment of the Money: and the Bill now was to have a greater Sum than 60 *l.* paid back.

A an Attorney takes *B* as his Clerk, and receives 120 *l.* and by Articles agrees with the Father of *B* to return 60 *l.* of the Money, if he died within a Year: *A* died within 3 Weeks. The Executor of *A* decreed to pay back 100 Guineas.

The Court, notwithſtanding the Parties themſelves had provided againſt Accidents, and agreed for a certain Sum, *to wit*, 60 *l.* to be returned, in caſe *Child* died within a Twelve-month, and that *modus & conventio vincunt legem*, yet decreed 100 Guineas to be paid back to the Plaintiff the Father.

Sir

Sir *Humphry Mackworth*'s Case.

Case 438.
2 Junij.
Lord Chancellor.
A Petition to the King, to direct his Judges to take a Fine or Recovery from an Infant, referred to the *Lord Chancellor.*

SIR *Humphry Mackworth* having married an Heiress, Petitioned the *King*, that his Majesty would be pleased by Privy-Seal to direct his Justices of *England* and *Wales* to take a Fine or Common Recovery, as there should be occasion, from his Wife, notwithstanding her Minority, she being now *eighteen* Years of Age, in order to the settling of her Estate to the Uses therein mentioned; so that the Petitioner might be sure, tho' his Wife should die (who was now big with Child) of an Estate for Life in the Premisses.

The *King* in Answer to the Petition signified, that he was satisfied with Sir *Humphry*'s Merit, and was graciously disposed to gratify him in this Matter; but however referred it to the *Lord Chancellor* to report what was fitting to be done therein: and now upon hearing Council on both Sides, one Mr. *Evans*, who had married the young Lady's Mother, opposed the Petition; but the *Lord Chancellor* declared, he thought the Petition reasonable, and that he would report the same to the *King* accordingly.

A Fine cannot be taken from an Infant, but a Recovery may, by the *King*'s Special Direction.

Note, Tho' the Petition pray'd, that the *Justices* might be directed to take a Fine or Common Recovery, Mr. Serjeant *Maynard* observed, that the Petition was inartificially drawn in that Matter, for that a Fine could not be taken from an Infant; nor was it ever done: but that a Common Recovery might be had, as desired, by the *King*'s Special Direction.

Heyward versus *Rogers.*

Case 439.
4 Junij.
In Court, Lord Chancellor.
A Term was limited to *A* for Life, then to *B* for Life, then to such

ONE *Prudence Goodwin* being possessed of a Term for Years settled the same in Trust for her self for Life, Remainder to one *Rebecca Hurst* for Life, and from and after

Child as *B* should leave at his Death, and for want of such Child to *C*.

Q. If the Remainder to *C* is good.

after the Death of *Rebecca*, to permit and suffer such Child or Children, as *Rebecca* should have at her Death, to receive and take the Profits thereof; and for want of such Child or Children, then in Trust for the Plaintiff. *Rebecca* had Issue a Son, who died in her Life-time without Issue.

The Question now was between the Plaintiff Remainder-man, and the Defendant, who was Administrator, as well to *Rebecca*, as to the Child.

It was objected, that the Remainder to the Plaintiff of the Term in Question was void, being to take Place after two Lives then in being, and the Death of such Child or Children as *Rebecca* should have, who were not then in being; to which it was answered, that all this was to happen and was circumscribed to the Life of *Rebecca* (to wit) in case she died leaving no Issue: and the Case of *Oakes* and *Chafford* was cited, and it was said, that if this Child had lived to contract Debts, or wanted a Maintenance, it would be hard that his Administrator should not have the Benefit of this Term: Or suppose the Son of *Rebecca*, tho' he died in the Life-time of *Rebecca*, had left a Son, it would be hard to carry this Term from the Child to the Reminder-man.

Case 440.
Eodem die.
In Court, Lord Chancellor.

Collins versus *Metcalfe*.

Devise of a Portion to a Child with Interest, but not to be paid to the Child till 21. Child dies at 20. Portion shall go to the Administrator of the Child.

A Portion devised to a Child with Interest, but not to be paid or payable until the Child attain *twenty one* Years or was married: the Child dies under *twenty one* and unmarried: decreed the Portion to the Administrator.

Spencer verſus *Wray.*

Caſe 441.
7 Junij.
In Court, Lord Chancellor.

ADjudged, that where the Suit abates, the Plaintiff may either bring an Original Bill, or a Bill of Revivor, at his Election.

Where a Suit abates, Plaintiff may bring an Original Bill, or Bill of Revivor, at his Election.

Heſter verſus *Weſton.*

Caſe 442.
Eodem die.

WHERE a Man demurrs, for that the Bill contains ſeveral Matters not relating one to the other, and in ſome whereof the Defendant is not concerned; if by Anſwer Defendant doth more than barely deny Combination and Confederacy, he over-rules his Demurrer.

If a Defendant demurs, becauſe the Bill contains diſtinct Matters againſt ſeveral Defendants, and anſwers further than denying Combination, he over-rules his Demurrer.
Ante Caſe 395.

Meredeth verſus *Jones.*

Caſe 443.
8 Junij.
In Court, Lord Chancellor.

BY Articles on the Marriage of the Plaintiff, the Plaintiff's Father was to pay 50 *l.* as a Portion with his Daughter, and the intended Husband in Conſideration thereof was to make a Settlement. The Marriage was had; but before the Money was paid, or Settlement made, the Plaintiff's Husband died inteſtate, and ſhe takes out Adminiſtration, and thereby becomes intitled to the 50 *l.* And now brings her Bill againſt the Heir of her Husband, for to have her Jointure according to the Marriage-Articles.

A. in Conſideration of a Portion, articles to ſettle a Jointure, and dies before the Portion paid, or Settlement made. The Wife takes Adminiſtration, and ſo becomes intitled to the Money, and then brings a Bill againſt the Heir of the Husband to have her Jointure ſettled.

Per Cur'. The Plaintiff ſhall not have the Money as Adminiſtratrix and alſo the Jointure too, which was agreed to be made in Conſideration of the Money, and in Expectation that the Husband ſhould have received it: and therefore diſmiſſed the Bill with Coſts. *Sed de hoc Quære*; for ſhe is intitled to theſe two Demands in diſtinct Capacities; and the Debts may appear hereafter to exhauſt the Aſſetts; and in caſe the Husband had actually received the

Bill diſmiſſed, for that ſhe was not intitled to the Money and the Jointure too. But *Quære.*

the Portion, and it had been in his Poſſeſſion, ſhe would have had it as his Adminiſtratrix.

Caſe 444.

Eodem die.

Bale verſus *Newton.*

After a voluntary Settlement a Man cannot deviſe the ſame Eſtate, tho' for Payment of his Debts.

A Joint-Purchaſor of Lands conveys his Part to the Uſe of himſelf for Life; Remainder, as to a third Part, to his Wife for a Jointure; Remainder of the whole to his Infant Heir in Tail; and two Days afterwards makes his Will, and deviſes the ſame Eſtate with other things to his Infant Heir in Tail, but ſubject to the Payment of his Debts, in caſe his Perſonal Eſtate ſhould not be ſufficient to pay his Debts, as alſo a Legacy of 250 *l.* The Perſonal Eſtate proving deficient to pay both Debts and Legacies, the End of the Bill was to have the Debts paid out of the Land, that ſo the Legacy might be paid out of the Perſonal Eſtate.

A Settlement, tho' Voluntary, is not revokeable.

Per Cur'. The Settlement, tho' voluntary, is not revokeable, and therefore having ſettled the Lands, the Teſtator had thereby diſabled himſelf to charge the Premiſes by his Will.

Caſe 445.

Eodem die.

Long verſus *Clopton.*

If an Heir or any other buys in an Incumbrance, he ſhall not be allowed, as againſt a Purchaſor, any more than he really paid for ſuch Incumbrance.

ON a Maſter's ſpecial Report, to whom the Account in Queſtion was referred to be taken, it was determined by the Court, that an Heir or any other ſhall not, as againſt a real Purchaſor, be allowed more on any Incumbrance bought in, than what he actually paid for the ſame, without regard to what was really due on ſuch Incumbrance: and that where a Prior Incumbrancer buys in a ſubſequent Incumbrance, with notice of an intervening Security, he ſhall not be allowed the ſame: and the Caſe of *Borough* and *Frances* was cited.

Ante Caſe 330

Stapleton verſus *Sherrard.*

Caſe 446.
Eodem die.

PER *Cur'*. The Wife has a Moiety of the Perſonal Eſtate of her Husband by the Cuſtom, and another Moiety of a Moiety, there being no Children, by the Statute for *diſtribution of Inteſtates Eſtates.*

Ante Caſe 299. 311. 407.

Robinſon verſus *Thompſon.*

Caſe 447.
10 Junij.
In Court Lord Chancellor.

PER *Cur'*. Where the Major Part of the Part-owners of a Ship ſettle and agree an Account of the Profits of a Voyage, it ſhall conclude the reſt: And the Plaintiff was ordered to pay Coſts.

An Account of the Profits of a Voyage ſettled by the Major Part of the Part-owners ſhall conclude the reſt.

Herne & al' verſus *Meeres.*

Caſe 448.
11 Junij.
In Court Lord Chancellor.

THE Plaintiffs were Creditors of Mr. *Cox*, Son of Dr. *Richard Cox* the Phyſician, by Bond, upon whom a conſiderable Eſtate was ſettled for his Life; he was Out-lawed, and Abſconded; and pending the Proſecution at Law againſt him, the Defendant Sir *Thomas Meeres*, having Notice thereof, purchaſed his Eſtate for Life, and gave between *three* and *four* Years Purchaſe for the ſame.

A Purchaſe of an Eſtate of Tenant for Life, who was Out-lawed and Abſconded, ſet aſide in favour of Creditors; the Purchaſe being made at an Under-value, and pending the Proſecution at Law againſt him, and with Notice thereof.

The Bill was to be relieved againſt this Purchaſe, as being a Truſt, or elſe it was fraudulent, it being bought at a great Under-value.

For the Plaintiffs it was inſiſted, the Purchaſe was made with full Notice of their Debts, and Proſecution at Law; that *Cox* abſconded, and was not to be met with at that very time when the Purchaſe was made; that the Purchaſe was at a great Under-value, *to wit*, between *three* and *four* Years Purchaſe; whereas the Defendant might have inſured his Life at 5 *l. per Cent.*

For the Defendant it was ſaid; as to the Over-value, that young *Cox* at the time of the Purchaſe was very ſickly, and his Eſtate was not then worth more to be ſold; and read ſome Proof to that purpoſe: that there was no Truſt, but the Purchaſe was abſolute; and the Plaintiffs had no *lien* on the Land: the Defendant had Notice, 'twas true, but 'twas of things immaterial; of Debts, that did not affect the Land: And if Notice of a Bond-Debt ſhall be ſufficient to ſet aſide a Purchaſe, it would obſtruct all Sales of the Eſtates of the Perſons that died Indebted.

Per Cur'. The Purchaſe is at a great Under-value, and hudled up in haſte, and at a time when young *Cox* concealed himſelf from his Creditors; and carries another ill Circumſtance along with it, which is, that the Defendant is a Truſtee in the Marriage Settlement; and for him to buy the Eſtate for Life of the Husband, was to take away the Maintenance and Support thereby intended and provided for the Wife and Children, on whoſe behalf he was intruſted; and all this with Notice of the Plaintiffs Debts, and Proceedings at Law, which ought to bear ſome Weight in this Caſe: and tho' the Plaintiffs Securities were not ſuch, as did immediately affect the Land, yet the Notice was ſuch; and *Cox*'s Abſconding, had he been a Trader, would have made him a Bankrupt, and then the Defendant muſt have loſt all his Money: And ſo at Law, where a Conveyance is found to be fraudulent, the Creditor comes in and avoids all without Repayment of any Conſideration-Money; and in Equity therefore, where the Court can decree back the Principal and Intereſt, there is no Hurt done; and a leſſer Matter in ſuch a Caſe will ſerve to ſet a Conveyance aſide: The Court therefore decreed the Defendant to reconvey upon Payment of his Principal and Intereſt, and that all Creditors, that were in equal degree, ſhould be let in *pro rata*, paying their Contribution; and that the Defendant might not any longer ſtand any Hazard in caſe young *Cox* ſhould happen to die, the Plaintiffs and ſuch Creditors as ſhould come in were

Ordered

Ordered by the Court to give Security within *three* Days to redeem the Defendant.

Bill verſus *Price.*

Caſe 449
Eodem die.

THE Defendant being an Exchange-Man had for many Years paſt practiſed upon young Heirs, by ſelling them Goods at extravagant Values, and to be paid *five* for *one* and more upon the Death of their Fathers, and had in that manner obtained from the Plaintiff and two other young Gentlemen, that were Heirs to good Eſtates, ſeveral Securities, wherein they were bound ſeverally and jointly in 4000*l.* for Payment of great Sums of Money.

Per Cur'. Decree the Plaintiff's Security to be delivered up on Payment of what the Defendant really and *bona fide* paid to him alone, and for his own proper Uſe.

Jennings verſus *Selleck.*

Caſe 450.
21 Junij.
In Court, Lord Chancellor.
Lord of a Weſt-Country Manor (his Tenants refuſing to renew) makes a Leaſe of the Premiſes to his Daughter for 99 Years, and afterwards ſells the Manor to *J S*, who has notice of the Leaſe, but has Security that the Daughter when at Age ſhould ſurender. Daughter decreed to have the Benefit of the Leaſe.

THE Plaintiff's Father being Lord of a Weſt-Country Manor, and the Tenant in Poſſeſſion of a Tenement refuſing to renew, the Lord thereof makes a Leaſe for 99 Years to the Plaintiff his Daughter, and afterwards ſells this Eſtate to the Defendant, who having notice of this Leaſe takes a collateral Security, that the Plaintiff ſhould releaſe within four Years, after ſhe attained her Age of 21 Years.

The Plaintiff's Bill was for an Account of the Profits of the Lands comprized in the Leaſe, and that ſhe might hold this Eſtate during the Leaſe, which the Defendant had got into his Poſſeſſion and had ſuppreſſed.

For the Defendant it was inſiſted, that this Leaſe made by the Lord to the Plaintiff his Daughter was but a Truſt for himſelf, and it was the uſual Method that Lords of Weſt-

West-Country Manors took, when the Tenant in Possession refused to renew; that they might have the Estate in their own Power.

Lord Chancellor. This Lease does not appear to be a Trust for the Father; but I take it to be an Advancement for his Child; and the Plaintiff having purchased with Notice of it, and taken a collateral Security, he must make the best of his Security; and therefore decreed the Possession, and an Account of Profits.

Case 451.

Eodem die.

Poole versus *Guise.*

After an Estate has been held under an Extent for a long Time, and has gone through several hands, Whether upon a Bill to redeem, the Defendant shall account otherwise than at the extended Value.

THE Bill was to redeem an Estate, which had been actually extended on a Judgment, so long since as in the *6 Eliz.* For the Defendant it was said, that tho' under an Extent, a Man has but an Estate *quousque* the Debt is satisfied, and so the same is always in its own nature redeemable; yet after this length of time, and after the Estate had gone through *five* or *six* Hands, it was in the Discretion of the Court to direct after what Method the Account should be taken; and that the Defendant ought not to account for more than the extended Value: But this Cause went off, upon a Proposition that the Defendant should be allowed what he paid, and account only for what he received during his own time.

Case 452.

23 Junij.

In Curia. Lord Chancellor.

Brett versus *Marsh.*

A Creditor by Judgment and also by Bond receives 200 *l.* in part, of the Purchasor of the Estate of the Debtor, but gives no Notice that he would

ON Exceptions to a Master's Report, to whom the Account in question was referred, it appeared the Defendant was an Incumbrancer by Judgment, and had also a Debt by Bond, and received 200 *l.* of the Purchasor of the Estate in part, but gave no Notice to the Purchasor, that it was to be applyed towards Payment of the Bond-debt.

Per

Per Cur'. It ſhall therefore be applyed towards Satisfaction of the Judgment, the 200*l.* being part of the Purchaſe-Money.

apply it to the Bond-debt. It ſhall be applied towards Satisfaction of the Judgment.

Noell verſus *Robinſon.*

Caſe 453. 25 Junij. *Lord Chancellor.* *Ante Caſe* 80. 426. 436.

PER *Cur'.* A Plantation in *Barbadoes* is not a Teſtamentary Eſtate by the Laws now in force; and therefore confirmed the Lord *Nottingham*'s Decree, which was for the Plaintiff Sir *Martin Noell*'s Children.

Capell verſus *Brewer.*

Caſe 454. 5 Julij. *Lord Chancellor.*

THE Bill was to be relieved againſt an Extent out of the *Exchequer*, taken out by the Contrivance of a Farmer of the Exciſe, who having a Debt owing him by a Man, that failed, procured the *King* to take that Debt in aid, and by that means to defeat all the other Creditors.

A Farmer of the Exciſe having Eſtate of his own ſufficient to ſatisfy what he owed the *King*, takes out an Exent in aid againſt a Perſon, who owed him Money, and had failed. Decreed to refund with Coſts.

Per Cur'. It is become a common Practice, and a great Oppreſſion in the City, that any Accomptant to the *King* ſhall ſell Wines upon Credit at an extravagant Price, and when the Man fails, an Execution comes, as the firſt Proceſs, out of the *Exchequer* at the *King*'s Suit, and ſweeps away all; ſo that all other juſt Creditors are defeated, and a Commiſſion of Bankrupt rendered ineffectual; and therefore declared, that where a Farmer of the Exciſe, as the Principal Caſe was, or other Accomptant to the *King*, had ſufficient Eſtate of his own to ſatisfie the *King*'s Debt, and ſhould uſe this Trick to defeat other Creditors, by getting the Debt owing to him to be taken in Aid of the Debt to the *King*, ſuch Perſon ſhould refund with Coſts; and decreed it accordingly.

Creſly verſus *Carrington.*

Caſe 455. Eodem die. *Lord Chancellor.*

THE Matter in difference having upon the Hearing been referred by the Court to Gentlemen in the

An Award made purſuant to an Order of Court muſt be

confirmed, as is done upon a Maſter's Report, and either Side has a Liberty to except to it.

Country, who had made an Award therein, the Cauſe was ſet down to be heard upon the matter of the Award, but was thrown off as coming on irregularly, for that the Plaintiff ought firſt to have moved to confirm the Award, as is done upon a Maſter's Report, and either Side may except to it, if they find occaſion; and then the Matter will properly come before the Court on thoſe Exceptions.

Caſe 456.
7 Julij.
Lord Chancellor.
A Defendant having ſworn that he received no more than ſuch a Sum to his remembrance, allowed to be ſufficient.

Hall verſus *Bodily.*

ON Exceptions to an Anſwer, the Defendant having ſworn he received no more than the Sum of ----- to his Remembrance, it was allowed to be a good Anſwer.

Caſe 457.
Eodem die.
The Court not ſatisfied with the Rule, that an Accomptant ſhall be allowed on his own Oath all Sums not exceeding 40 *s.* ſo as the whole is not above 100 *l.*

Whicherly verſus *Whicherly.*

THE Court being informed, that the Courſe of the Court was that an Accomptant was to be allowed on his own Oath all Sums not exceeding 40 *s.* each, ſo as the whole was not above 100 *l.* declared *that* Rule ſeemed very unreaſonable, and would conſider how to rectify it.

DE

Term. S. Michaelis,

3 *Jacobi II.* 1687.

In Curia Cancellariæ.

Kettleby verſus *Atwood.*

Caſe 458.
19 Octobris.
In Court, Lord Chancellor.
Ante Caſe 293.

THIS Cauſe came on to be Reheard, and the Queſtion now was between the Wife and the Heir on the Part of the Husband, who ſhould have the Money after the Death of the Wife; the Wife being Adminiſtratrix both to her Husband and her Child: And the Court decreed for the Heir, that the Money was bound by the Articles, and ſhould be for the Benefit of the Heir, as the Land ſhould have gone, in caſe the Money had been laid out according to the Articles: And the Caſe of *Whittick* and *Jermin* was cited, which had been lately Decreed by this *Chancellor*, and was a Caſe in Point; and the *Chancellor* ſaid, he remembered the Caſe of *Lawrence* and *Beverley* upon a ſpecial Verdict before the Lord Ch. Juſtice *Hales*, in which himſelf was of Council, and it was there ruled, that the Money was not Aſſetts to ſatisfiy a Creditor, but was Bound by the Articles.

2 *Keeb.* 841.

In the Arguing of this Caſe it was inſiſted for the Defendant, that the Wife by the Articles had an Election, in caſe her Husband died without Iſſue, whether ſhe would have

have the Land or the Money, and had six Months time to make this Election after the Death of the Husband; and altho' the Husband had Issue at his Death, yet that Issue died within the six Months, and therefore the Wife might elect. *Sed non allocatur*, for the Husband having Issue at his Death, he could not be said to die without Issue; so no Election could arise to the Wife. And the Case of *Goodier* and *Clark* was cited in *Siderfin, Part.* I. *fo.* 102.

Case 459.

Eodem die.

Lord Chancellor.

A agrees with *B* to purchase a Copyhold for two Lives; pays 200*l.* in part, and was to pay the Remainder in three Months, and then to name his Lives and take up his Copy; a Court is held, the three Months expire, and *B* dies suddenly; and the Manor comes to one who was not bound by this Agreement. The Executor of *B* decreed to repay the 200*l.*

Awbry versus *Keen.*

THE Plaintiff was Tenant to Mr. *Thynne*, and contracted with his Steward or Bayliff for a Copyhold Estate for *two* Lives; he pays 200*l.* down, and was to pay the Residue on the taking up of his Copy, which he was to do in *three* Months, and then to name his two Lives. A Court was held accordingly, the *three* Months expire, and the Plaintiff neglects to name his two Lives and take up his Copy; and before any thing further was done, Mr. *Thynne* died suddenly, being murthered; upon whose Death the Manor came to the Lord *Weymouth*, by vertue of a Remainder limitted in a Settlement, so that he was not bound by this Agreement.

The Plaintiff's Bill was to compel the Defendant, Mr. *Thynne*'s Executor, to refund; which was Decreed accordingly, altho' it was insisted, that it was the Plaintiff's own Laches that he had not the Estate.

Case 460.

Eodem die.

Lord Chancellor.

A and *B* being joint Lessees, *A* by Parol agrees to sell his Interest

Allsopp versus *Patten.*

THERE are two joint Lessees of a building Lease; the one agrees to sell his Moiety to the other by Parol for *four Guineas*, and accepts a *pair* of *Compasses* in Hand

Hand to bind the Bargain; the Bill is to have a ſpecifick Performance of the Agreement.

to *B*, and accepts a pair of Compaſſes in Hand to bind the Bargain. Whether this is within the Statute of Frauds?

The Defendant pleads the Statute of *Frauds* and *Perjuries*: The Agreement being in ſome part executed, the Court ordered the Defendant to anſwer, and ſaved the Benefit of the Plea to the Hearing.

Winn verſus *Fletcher.*

Caſe 461. Eodem die. *Lord Chancellor.*

THE Plaintiff entitles himſelf as Adminiſtrator, the Defendant pleads the Plaintiff is not Adminiſtrator. It was objected this is a Negative Plea. *Per Cur'.* Allow the Plea: It is a good Plea in Abatement at Law.

Plaintiff entitles himſelf as Adminiſtrator. Defendant pleads Plaintiff is not Adminiſtrator. A good Plea in Abatement in Equity, as well as at Law.

Foſter verſus *Munt.*

Caſe 462. 25 Octobris. *In Court, Lord Chancellor.*

JOHN *Markham* by Will deviſed particular Legacies to his Children and Grand-children, and 10 *l.* a-piece to *Munt* and one *Symonds*, whom he made Executors, for their Care. The Surplus being 5000 *l.* and upwards, the Queſtion was, whether the Surplus ſhould be a Truſt for the Children, or go to the Executors. Decreed a Truſt for the Children.

A. B. by Will gives Legacies to his Children and Grand-children, and 10 *l.* a-piece to his Executors for their Care, and makes no Diſpoſition of the Surplus. Decreed the Executors to be Truſtees for the Children, as to the Surplus.

Barker verſus *Talcot* and *Shaw.*

Caſe 463. 27 Octobris. *In Court, Lord Chancellor.*

THE Plaintiff *Barker* held a Farm by Leaſe from one *Talcot*, who dies inteſtate, and *Talcot* his Son takes Adminiſtration, and ſettles an Account with *Barker* for the Rent then in Arrear, which amounted to 60 *l.* *Barker* ſatisfied 29 *l.* part thereof, by Cheeſe, *&c.* and gives a Note under his Hand promiſing Payment of the remaining 31 *l.* to *Talcot* the Son: Before the 31 *l.* are paid, *Talcot* the Son alſo dies Inteſtate, and afterwards Plaintiff *Barker*

A indebted to *B* for Rent. *B* dies. *C* Adminiſtrator to *B*. *A* gives a Note for this Rent to *C*. *C* dies inteſtate. This Note is an

Alteration of the Property, and the Rent belongs to the Adminiſtrator of *C*, and not to the Adminiſtrator *de bonis non* of *B*.

ker pays the 31 *l.* to Mr. *Shaw* the Adminiſtrator of the Son: After this *Talcot* the Defendant takes out Adminiſtration *de bonis non* to *Talcot* the Father, and then brings an Account againſt Plaintiff for the 31 *l.* Upon the Tryal the Judge doubting, whether the Note given to *Talcot* the Son was an abſolute Converſion, a Verdict was ſuffered for the Plaintiff, which by Agreement was to ſtand as a Security, and a Caſe was to be made for the Opinion of the Judges; and pending that Matter, *Barker* brought his Bill againſt the Adminiſtrator of the Son, and alſo againſt the Adminiſtrator *de bonis non* of the Father, ſetting forth the Matter as above, and praying Relief, and that he might not be doubly charged, and compelled to pay the ſame Money twice.

The *Lord Chancellor* on a full Hearing adjudged the Note given to *Talcot* the Son for the 31 *l.* to be *quaſi* a Payment, and a good Converſion in him, and that the ſame ought to go to his Adminiſtrator, and not to the Adminiſtrator *de bonis non* of the Father.

Sir *Tho. Jones*'s Rep. 88.

A owes Mony to *B* who dies, and his Adminiſtrator takes *A*'s Covenant for the Debt. *A* becomes inſolvent: This is a *Devaſtavit* in the Executor.

In the arguing of this Caſe was cited the Caſe of *Norden* and *Levett*, where an Adminiſtrator brought *trover* for Goods, and recovered, and takes part in Hand, and accepts a Covenant for Satisfaction of the Reſidue; and the Debtor afterwards failed. It was adjudged in the *King's-Bench* to be a *Devaſtavit* in the Adminiſtrator, and the Judgment was afterwards confirmed upon a Writ of Error in the Houſe of *Lords*: And the *Lord Chancellor* cited a Caſe adjudged by Serjeant *Pemberton*, when Chief Juſtice, where an Executor of an Obligee accepted a Note drawn on a Goldſmith for the Money, the Goldſmith accepted the Bill, and before Payment fails: The Executor afterwards brought an Action upon the Bond, and this Matter being given in Evidence was adjudged a good Payment.

Gale versus *Lindo.*

Case 464.
29 Octobris.

In Court Lord Chancellor.

A on the Treaty of Marriage of his Sister with *B* lets her have 160*l.* privately, that her Fortune might appear to be as much as was insisted on by *B*, and takes her Bond to repay it.

The Executor of *A* puts the Bond in Suit against the Executor of the Sister, who survived her Husband.

Upon a Bill to be relieved, Bond decreed to be delivered up as fraudulent.

THE Case was, that when a Marriage was treating between one *Gringer* and the Sister of *William Pitman*, the Woman not having so great a Portion as the Man insisted upon, she prevails with her Brother *Pitman* to let her have 160*l.* to make up her Portion, and gave him Bond for Repayment of it; and thereupon the Marriage was had: And the Husband, who knew nothing of the Bond, died without Issue, and his Wife survived him, and afterwards died having made her Will, and the Plaintiff Executor. *William Pitman* the Brother dies, and makes the Defendant his Executor, who put the Bond in suit against the Plaintiff, as Executor of the Widow, to recover back the 160*l.* and thereupon he brings his Bill to be relieved.

For the Defendant it was insisted, that altho' this might be a Fraud, as against the Husband or any Issue of his, who were to have the Benefit of the Marriage Agreement; yet the Husband being dead, and there being no Issue, this Bond is good against the Woman her self, and by Consequence against her Executor, there being no Creditors in the Case, or any Deficiency of Assetts pretended.

Lord Chancellor. You admit the Husband might have been relieved on a Bill brought by him and his Wife; that which was once a Fraud, will be always so; and the Accident of the Woman's surviving the Husband will not better the Case. Decreed the Bond to be delivered up, and a perpetual Injunction against it.

Quære, If the Condition of the Bond had been, that in case the Woman survived her Husband, that she should repay it, whether she could have been relieved?

Note,

Note, It was opened in this Case, that after the Death of the Husband, the Wife agreed to repay the Money, and actually paid Part. *Sed non allocatur.*

Case 465.
4 Novembris.
In Court Lord Chancellor.

Williams versus *Springfeild.*

Mortgagee assigns his Mortgage for less than is really due to him.
The Mortgagor shall not redeem without paying the whole Money due on the Mortgage.

THE Plaintiff had Mortgaged the Lands in Question to *J S*, who finding it was a slender Security, and not worth the Money due thereon, the Plaintiff's Wife, in case she should happen to survive her Husband, having a Right of Dower in the Mortgaged Estate, *J S.* agreed with Defendant *Springfeild* to Assigne the Mortgage to him for 100 *l.* altho' there was 150 *l.* then due to him thereon. The Plaintiff now brought his Bill to redeem, and the sole Question was whether the Defendant should be allowed all the Money that was then really due on the Mortgage.

Where there are subsequent Incumbrances or Creditors in the Case, a Man that buys in a Prior Incumbrance shall be allowed only what he really paid.
But otherwise it is, as between him and the Mortgagor or his Heir.

Per Cur'. Where there are subsequent Incumbrances or Creditors in the Case, there a Man, that buys in a Prior Incumbrance, shall be allowed only what he really paid, tho' there was in truth a greater Sum due: But where the Mortgagor himself or his Heir comes to redeem, there is no Reason that he should have the Benefit of a good Bargain made by another Man, and ought therefore to pay what is really due on the Mortgage, whatever it be, without respect to what the Assignee paid: And decreed it accordingly.

Case 466.
11 Novembris.
In Court, Master of the Rolls.

Fulthrope versus *Foster.*

A conveys Lands to *B*, who is put into Possession, but under an Agreement, that if *A* pays the Money in 10 Years, *B* shall reconvey.

THE Mother, who had an Estate for Life, joins with her Son, who had the Inheritance, in a Conveyance of Lands of 4 *l. per Ann.* and a Profit out of some Cole-mines, which *communibus annis* were worth 9 *l. per Ann.* for 90 *l.* The Deed was absolute, and the Vendee was immediately put into Possession, but on a Proviso, that if the Son should pay

pay the Mony at the end of 10 Years, the Defendant ſhould reconvey to the Son.

The Profits appearing to be much more than the Intereſt, upon a Bill by the Heir to redeem, *B* decreed to account for the Profits, and not permitted to ſet the Profits againſt the Intereſt.

The Bill was brought by the Son to redeem; and the ſole Queſtion was, whether the Defendant ſhould retain the Profits in lieu of the Intereſt, or ſhould Account for what he had received out of the Eſtate.

It was inſiſted, that the Mother, who had parted with her Eſtate for Life, had the moſt reaſon to complain, and yet ſhe was content the Defendant ſhould have the Profits in lieu of the Intereſt; that the Son had a good Bargain of it, for he had got to himſelf his Mother's Eſtate for Life, and that this was but like the Caſe of *Welch* Mortgages, where the Mortgagee is put into Poſſeſſion immediately, under a Proviſo to have a Reconveyance on Payment of the Principal Money; ſometimes at a time prefixt, and often at any time whatſoever; and there the Profit always goes againſt the Intereſt. That this Caſe was ſtronger, by reaſon that the Profits here ariſing out of the Cole-mines were more uncertain than the Profits of Lands.

But the *Maſter* of the *Rolls* thought, that in this Caſe the Profits being 13 *l. per Ann.* 'twas altogether unjuſt and unreaſonable, that the ſame ſhould go in lieu of the Intereſt of 90 *l.* And as touching *Welch* Mortgages, he thought, if the Value was exceſſive, the Court would Decree an Account, notwithſtanding the Agreement for retaining the Profits in lieu of Intereſt: and he thought the Court would relieve againſt a *Briſtol* Bargain, to *wit*, where *A* lends *B* 1000 *l.* on a good Security, and as to one 500 *l.* it is agreed between the Parties, that it ſhould be repaid together with Intereſt for it, as it ſhould become due; and as to the other 500 *l.* that *B*, in Conſideration thereof, ſhould pay unto *A* 100 *l. per Ann.* for *ſeven* Years; and in the principal Caſe he decreed a Reconveyance on Payment of what ſhould appear to be due, diſcounting the Profits received.

Deering verſus *Hanbury.*

Caſe 467.
12 Novembris.
In Court, Maſter of the Rolls.

A by Will gives the Surplus of his Perſonal Eſtate to his Daughter, whom he makes Executrix, and willed, that if ſhe died without Iſſue it ſhould go over to *B*, and that ſhe ſhould give Security that if ſhe died without Iſſue it ſhould go over accordingly.

The Deviſe over is Void; but whether the directing a Bond to be given *&c.* does not alter the Caſe?

J. S. by Will having diſpoſed of a Term for Years, whereof he was Poſſeſſed, and bequeathed ſeveral Legacies, deviſes all the reſt of his Eſtate (being Chattels Perſonal only) unto the Defendant his Daughter, whom he alſo makes Executrix; But willed, that in caſe his ſaid Daughter died without Iſſue, that the ſame ſhould go over to the Plaintiffs; and appoints that ſhe ſhould give Security, that in caſe ſhe died without Iſſue, the Eſtate ſhould go over accordingly.

The Bill was to compel the Defendant to diſcover the Eſtate, and to give Security. The Defendant demurred, for that the Deviſe-over was void, and that therefore ſhe ought not to be inforced, either to diſcover the Eſtate, or to give Security.

The Council for the Plaintiff did admit, that had there been nothing more in the Caſe, than a Deviſe to the Defendant and her Iſſue, and in caſe ſhe died without Iſſue, it ſhould go over to the Plaintiffs; *that* would have been void, had the Deviſe been of a Term for Years, and much more of Chattels meerly Perſonal, as the Principal Caſe was; for where Chattels Perſonal are deviſed to one for Life (that is, if the things themſelves, and not the bare Uſe thereof only, be deviſed) a Deviſe over is void; and cited the Caſe of *Whitmore* and *Chemiſh*; but they took it, that the Teſtator having made his Daughter as well Executrix as Reſiduary Legatee, and appointing her to give Security for the Purpoſe aforeſaid, it made this a different Caſe from thoſe, that had been put: and they took it clearly, that if a Man by his Will gave his Eſtate to his Executor upon Condition, that the Executor after his Death ſhould have his Eſtate fairly Appraized, and Inventoried, and directs that his Executor ſhould within *ſix* Months

2 Ch. Rep. 167.

Months give Bond to *I S*, conditioned to pay to *I S* ſuch Sum, as the ſame ſhould be appraized at, at the end of *ten, twenty* or *thirty* Years after his Death, that ſuch Conditional Deviſe would be good; as would alſo the Bond: And ſo they took it, it would be, in caſe the Condition was to give Bond to pay the Value thereof to *I S*, in caſe the Executor ſhould die without Iſſue: and ſo in the Principal Caſe, tho' the Deviſe-over would not be good as to the Perſonal Chattels themſelves, which were every day waſting and ſpending; yet the Security would be good for the Value thereof.

But it was obſerved by the Plaintiff's Council, that the Security in this Caſe by the Will appointed to be given was not to pay the Value of the Eſtate, but that the Eſtate it ſelf ſhould go over upon her dying without Iſſue, which was repugnant and void in Law: for this in effect is to entail a Bond, and ſhould this be admitted, in time we ſhould (as a Judge upon the like Occaſion once expreſſed himſelf) entail old Shoes.

The *Maſter* of the *Rolls* thought fit to ſave the Benefit of the Demurrer to the Hearing: and appointed the Defendant to anſwer as to the Will, but not to diſcover the Eſtate, unleſs the Court ſhould ſo think fit upon the hearing of the Cauſe.

Towers verſus *Davys*.

Caſe 468.
14 Novembris.

In Court, Lord Chancellor.

The Heir is not intitled to ſee any Deeds in the Hands of the Jointreſs, without confirming her Jointure, tho' the Jointure was made after Marriage.

THE Plaintiff as Heir at Law brought a Bill for the Deeds and Writings that concerned his Eſtate; the Defendant inſiſting, that ſhe having a Jointure of Part, ought not to diſcover or part with her Writings, until her Jointure was confirmed.

For

For the Plaintiff it was inſiſted, the Jointure was made after Marriage, and not purſuant to any precedent Articles, and was purely voluntary.

Per Cur'. Confirm the Jointure, or you ſhall not ſee the Deeds. But whereas the Defendant inſiſted ſhe was intituled to other Part of the Eſtate as Adminiſtratrix, by reaſon of a Leaſe for Years, which had been heretofore made thereof, and ſhe having by Letter acknowledged, that the Leaſe was intended to attend the Inheritance, the Court compelled her to agree to relinquiſh all her Pretenſions to the Leaſe, and unleſs ſhe would ſo do, declared ſhe ſhould be ordered to produce all the Writings without having any Confirmation of her Jointure.

Caſe 469. 15 Novembris. *In Court, Lord Chancellor.*

Sir *William Cann* Barr^t verſus *Domina Anna Cann* Vid'.

A on the Marriage of his Son covenants to ſettle Lands to the Uſe of the Son for Life, then to the Wife for Life, Remainder to the Heirs Male of the Body of the Son. *A* dies and makes his Son Executor, who dies and makes a ſecond Wife Executrix. The Grandſon brings a Bill againſt the Executrix to have Satisfaction on the Covenant, or that he might ſue it in the Truſtees Names. Bill diſmiſſed, the Plaintiff's Father being Tenant in Tail, and might have

WILLIAM Cann, the Plaintiff's Grand-father, on the Marriage of Sir *Robert Cann*, the Plaintiff's Father, ſettled the Manor of *Breane* in *Glouceſterſhire* and other Lands to the Uſe of Sir *Robert* for Life, then to his intended Wife for Life, Remainder to the Heirs Males of the Body of Sir *Robert*; and covenanted to purchaſe other Lands of the Value of 50 *l. per Ann.* and to ſettle them to the like Uſes. *William* the Grandfather died, and left a conſiderable Perſonal Eſtate, and made Sir *Robert* his Executor. Sir *Robert* levied a Fine and thereby barred the Entail of the ſettled Lands, and by his Will gave his Eſtate to his Son by the Defendant, who was his ſecond Wife, and gave the Plaintiff an Annuity of 200 *l. per Ann.* for Life only, and that upon Condition to releaſe his Executrix of all Demands, which he refuſed to do, by reaſon that his Father had in his Life-time entered into a Bond of the Penalty of 12000 *l.* to leave the Plaintiff 6000 *l.* at his Death.

The

The Plaintiff's Bill was, that he being the Iſſue in Tail might have Satisfaction made him on this Covenant, or at leaſt might have liberty to ſue the Covenant in the Truſtees Names; and it was ſaid, that it was the more reaſonable the Plaintiff ſhould take Advantage of the Covenant, in regard he was diſinherited.

barred the Plaintiff if a Settlement had been made.

But it being inſiſted for the Defendant, that this was a Covenant of *William* the Grandfather, and was broken in the Life-time of Sir *Robert* the Plaintiff's Father, who thereby became intituled to the Damages on that Covenant; and the Plaintiff's own Bill was, that Sir *Robert* as Executor to his Father had out of his Perſonal Eſtate retained a Satisfaction for the Non-performance of this Covenant; and that in caſe the Lands had been purchaſed and ſettled according to the Covenant, yet it had the next Day been in the Power of Sir *Robert* to have barr'd the Entail by levying of a Fine, or ſuffering a common Recovery; and that therefore there was no reaſon now to carry this Covenant into an Execution in Equity for the Benefit of the Plantiff, the Iſſue in Tail, and that againſt the Executrix of an Executor: The Court was clear of an Opinion, that in regard Sir *Robert* had been Tenant in Tail, in caſe this Settlement had been actually made, and ſo might have barred the Eſtate, the next Day, as he hath done all other the intailed Lands; that the Plaintiff ought not to be relieved as touching that Covenant, but diſmiſſed that Part of the Bill.

And the Bill being alſo to have Satisfaction for a Legacy of 50 *l.* deviſed to the Plaintiff by *Humphrey Hooke* his Grandfather in 1658, and another Legacy of 100 *l.* which was deviſed to the Plaintiff by *Cicily Hooke* his Grandmother in 1660, both which had been received by his Father, it was inſiſted for the Defendant, that the Plaintiff had received ample ſatisfaction for theſe Legacies from his Father in his Life-time; and more particularly that the Bond of 12000 *l.* entered into by Sir *Robert* to

leave the Plaintiff 6000*l.* at his Death, was in time long after he had received theſe Legacies; and that all the Plaintiff's Demands muſt naturally be intended to be included in this Bond; and that beſides all this, the Plaintiff in Anſwer to a Croſs Bill had inſiſted on the Statute of Limitations.

Lord Chancellor. I will do all I can to help an Heir that is diſinherited; and you ſhall be allowed nothing more than what you can prove to have been actually paid towards Satisfaction of theſe Legacies; and *eo nomine*, as in part of the Legacies, and ſhall pay the Reſidue with Intereſt.

Caſe 470.

16 Novembris.

In Court Lord Chancellor.

Goſling verſus *Dorney.*

Where Lands are deviſed for Payment of Debts and Legacies, the Debts and Legacies ſhall be paid *pari paſſu.*

WHERE Land is deviſed to be ſold for Payment of Debts and Legacies: The *Lord Chancellor* was of Opinion, that the Debts and Legacies ſhould be paid in equal proportion, without any Preference to the Debts: And ſo it was reſolved in the Caſe of Sir *John Bowles* by the Lord *Nottingham*, that Debts and Legacies ſhould be paid *pari paſſu*; but the Lord *North* reverſed that Decree, and gave Preference to the Debts: And ſo the Lord *North* likewiſe in the Caſe of *Hixon* and *Witham*, decreed the Debts to be firſt paid; but the *Lord Chancellor* declared he was not ſatisfied with that Opinion, but would conſider of it.

1 Ch. Rep 248.

Caſe 471.

Eodem die.

Lady *Shore* verſus *Billingſly.*

Surplus of a Perſonal Eſtate bequeathed to *A* and *B*. It is a joint Deviſe, and ſhall ſurvive.

A Man having deviſed the Surplus of his Eſtate after his Debts paid to *A* and *B*, *A* dies. It was adjudged in the *Delegates*, and decreed by the Lord *North*, and now confirmed by the *Lord Chancellor*, that this was a joint Deviſe, and ſhould ſurvive to *A*; and the *Lord Chancellor*

cellor's Opinion was, that if *A* and *B* had been made Executors, and *A* had poſſeſſed a Moiety of the Goods and died, it would have been all one: And the Caſe of *Cox* and *Quaintont* was cited, where there were two joint Executors, and one died; adjudged his Executor or Adminiſtrator ſhould not have an Account againſt the Survivor.

There are two Executors, and one dies, his Executor or Adminiſtrator ſhall not have an Account againſt the Survivor. 1 Ch. Rep. 238.

Whaley verſus *Norton & al'.*

Caſe 472.
18 Novembris.
In Court Maſter of the Rolls.

Bill to be relieved againſt a Bond to pay 400 *l.* to a Woman whom the Plaintiff kept as a Miſtreſs. Relief denied.

THE Bill was to be relieved againſt a Bond and Judgment, defeazanced for the Payment of 400 *l.* to the Defendant; and the Bill charged, that whereas the Security recited 400 *l.* to have been lent and paid by the Defendant to the Plaintiff, that in truth the Money was never really lent or paid: The Defendant by Anſwer confeſſed, that the 400 *l.* was not lent or paid by her, and that it was never meant or intended ſo to be, and that it was the Miſtake of the Scrivener in making the Security after that manner, for that the 400 *l.* thereby intended to be ſecured was the free Gift of the Plaintiff unto the Defendant.

The Truth of the Caſe was, that the Defendant was for ſome time kept by the Plaintiff, and this 400 *l.* was given her upon that Account; but of that no Notice was taken in the Bill, and the Council for the Defendant inſiſted, that it being a free Gift, no Equity could relieve againſt it; and cited the Caſe of *Bourman* and *Uphill*, which was this very Caſe in point, and the Equity laid in the Bill the ſame, *to wit*, that it purported to be a Security for Money lent; whereas no Money was really lent or paid: And the Court would not relieve in that Caſe, tho' the Gift was upon the like Account: And the Caſe of *Peacock* and *Mainklin* was alſo cited.

The *Maſter* of the *Rolls* ſaid, that there would be a Difference in theſe Caſes between a Contract executed and exe-

executory; and that this Court would extend Relief as to things executory, which if done, it may be might ſtand: But as this Caſe was, he ſaw no ground to relieve the Plaintiff, nothing appearing to him, but it was a free and voluntary Gift, without any thing of *turpis contractus*: And in caſe it had been ſo, yet we know that *Adam* was puniſhed, tho' tempted by *Eve*; becauſe he would be tempted. But if it had been charged in the Bill, that the Defendant was a common Strumpet, and ſhe commonly dealt and practiſed after that ſort, and uſed to draw in young Gentlemen, in ſuch caſe he thought it reaſonable the Court ſhould relieve; and the Plaintiffs had in this Cauſe proved as much; but the Defendant's Council oppoſed the reading to that Matter, by reaſon it was not charged in the Bill, nor in Iſſue in the Cauſe; ſo they prayed Liberty to amend their Bill, and to charge that ſpecial Matter, paying the Coſts of that Day, and of the Depoſitions taken in the Cauſe.

But otherwiſe it had been, if the Obligee was a common Strumpet.

But then it muſt be ſo charged in the Bill, and put in Iſſue; for otherwiſe, if it is ſo proved, the Depoſitions cannot be read.

John Walley an Infant *per Prochein Amy* Plaintiff.

Peter Whalley, Thomas Gaudy, Robert Warner, & al'. Defendants.

Caſe 473.
19 Novembris.
In Court, Lord Keeper.

An Executor in Truſt for an Infant Reſiduary Legatee renews a Leaſe, part of the Teſtator's Perſonal Eſtate, in his own Name, and having Mortgaged it, aſſigns the Equity of Redemption to a Truſtee to ſell for Payment of his own Debts. The Truſtee ſells to one who had notice of the Infant's Title. Purchaſe ſet aſide.

Francis Walley, the Plaintiff's Grand-father, being, amongſt other things, poſſeſſed of ſeveral Meſſuages and Tenements at *Mile-end* in *Stepney* in *Com' Middleſex*, for a Term of 40 Years, in which there was at his Death about 35 Years to come, which he held by Leaſe from *Clare-hall* in *Cambridge*, and which Meſſuages were worth about 90 *l.* *per Ann.* over and above the Rent reſerved on the Leaſe, and being ſo poſſeſſed and of other Perſonal Eſtate, in *November* 1671 he made his laſt Will and Teſtament, and thereby deviſed ſeveral Legacies amounting unto about 60 *l.* and then deviſes in theſe Words, *viz.* Item, *all the reſt and reſidue of my Lands, Houſes, Tenements, Goods, Chattels,*

Chattels, Houſehold-Stuff, and Plate, Jewels, and whatſoever elſe belongs to me in this World, as well that which is unnamed, as that which is named, I give and bequeath unto my loving Grand-child John Walley *the younger* (to wit the Plaintiff) *and I do make my Son-in-law* John Walley (to wit the Plaintiff's Father) *Executor in Truſt for my ſaid Grand-child* John Walley. Afterwards in 1677 the Teſtator died, and *John Walley* the Father proves the Will, poſſeſſes the Perſonal Eſtate, and in *March* 1678 ſurrenders the old Leaſe, and takes a new Leaſe from *Clare-hall* in his own Name for the ſame Term as was unexpired of the old Leaſe, and without Payment of any Fine or other Conſideration; and having ſo done, he Mortgages part of the Eſtate to one *Williams* for 200 *l.* which Mortgage by meſn Aſſignments was come down to the Defendant *Seymour* in truſt for *Gaudy*, who had lent a further Sum of 350 *l.* on a Security by way of Mortgage of the Premiſſes: After this *John Walley*, the Plaintiff's Father, makes an Aſſignment of his Equity of Redemption to the Defendant *Peter Whalley* upon truſt to ſell and diſpoſe of the Premiſſes for Payment of his Debts, and then goes beyond Sea as a common Soldier to the *Indies* in the Service of the *Eaſt India* Company. The Defendant *Warner* being a Sea Captain, and having got a Sum of Money together, employs one *Peters* a Scrivener to find him out a Purchaſe, who informs him of the Eſtate in queſtion, and brings *Peter Whalley* the Truſtee and *Warner* together, and *Warner* contracts with *Whalley* to purchaſe the Premiſſes at the Price of 870 *l.* and pays off *Gaudy*, and takes an Aſſignment of his Mortgage.

The Plaintiff's Bill ſet forth the Matter, *ut ſupra*, and charged that *Gaudy*, before he lent his Money, as alſo *Warner*, before he had paid any part of his Conſideration Money, had full notice of the Plaintiff's Title, and that his Father was only Executor in Truſt for him; and therefore prayed an Account of Profits, and to be let into Poſſeſſion, and to have the new Leaſe aſſigned.

Gaudy by Anſwer confeſſed, that he had Notice before the lending of the Money; but that he was at the ſame time told, that *Calley* the Grand-father died greatly indebted, and that his Executor was in disburſe 500 *l.* and more for the Payment of his Debts, and ſet forth what Profits he had received during the time he was in Poſſeſſion; and that he had accepted of what reſted due on his Mortgage from *Warner* the Purchaſor, and had thereupon aſſigned the ſame unto him.

Warner ſet forth his Purchaſe, and that he had paid off *Gaudy*, and taken an Aſſignment of his Mortgage, and that he had not yet paid the Reſidue of his Purchaſe-Money; but had given a Note for it to *Peter Whalley* the Truſtee, and denied he had notice of the Plaintiff's Title before his Purchaſe.

The Cauſe coming this Day to be heard, and it being fully proved, that *Warner* had Notice before any of his Purchaſe-Money was paid, or Deeds executed, and that the Will of *Calley* was read over both to him and *Peters* the Scrivener before his Purchaſe: It was inſiſted by his Council, that he ought notwithſtanding to have the benefit of *Gaudy*'s Mortgage; for that it was not proved in the Cauſe, that *Gaudy* had notice before he lent his Money; and tho' *Gaudy* had by Anſwer confeſſed Notice, yet that could not bind *Warner* the Purchaſor; but that the Plaintiff might have examined *Gaudy de bene eſſe* againſt *Warner* to have proved the Notice; and that *Gaudy* being before the Court, the Plaintiff might take a Decree againſt him for that Money. But it was anſwered, that *Warner* having purchaſed with full Notice, he ſtands affected with the Truſt, and can't defend himſelf as an innocent Purchaſor; and tho' *Gaudy*'s Anſwer cannot be read againſt him as Evidence; yet if he would mend his Caſe, on pretence that *Gaudy* had no Notice, he then muſt ſtand in *Gaudy*'s place, and *Gaudy*'s Confeſſion of Notice, as to the Title he derives from *Gaudy*, will bind him; and *Gaudy* cannot transfer

transfer to *Warner* a better Right, than he himſelf had, and he confeſſes he came in with Notice; and *Warner*'s Council then prayed, in regard that *Gaudy* was a Defendant before the Court, that the Plaintiff might take his Decree againſt *Gaudy* for the Money paid to him by *Warner* the Purchaſor.

The Court decreed the Plaintiff ſhould be let into Poſſeſſion, and have the Benefit of the new Leaſe, and an Aſſignment thereof from the Defendants, and an Account of the Profits, for what each Defendant reſpectively had received: But with this, that the Maſter ſhould alſo take an Account of the Perſonal Eſtate of *Calley*, the Plaintiff's Grand-father, and what the Plaintiff's Father paid for the Debts and Legacies of *Calley*, more than what the other Perſonal Eſtate of *Calley* would amount unto, ſhould be allowed upon the Account; and *Warner* ſhould be likewiſe allowed what he had laid out in laſting Improvements upon the Premiſes, tho' they were made pending the Suit; and that *Peter Whalley* ſhould deliver up to *Warner* the Note or Bill he gave for the Payment of the reſidue of his Purchaſe-Money, and *Warner* was left at liberty to bring his Bill againſt *Gaudy* for the Money he had paid to him on the Aſſignment of his Mortgage.

In the Arguing of this Caſe was cited the Caſe of *Culpepper* and *Aſton*, wherein it was ſettled, that where Truſtees are appointed to ſell Lands for the Payment of Debts, the Sales by them made of what was more than ſufficient for the Payment of Debts are not good. 2 Ch. Rep. 115. *Vide Caſe* 297.

Note, In this Caſe the Plaintiff's Father, who was the Executor in Truſt, being gone to the *Indies* as a common Soldier in the Service of the *Eaſt India* Company, and the Plaintiff making Affidavit of that Matter, and that he knew not whether his Father was living or dead, nor where to find him to ſerve him with Proceſs, it was upon a Motion Ordered, that the Plaintiff might Proceed againſt the other Defendants without prejudice, for not bringing his Father to Hearing; and the Plaintiff had the Decree *ſupra* without bringing his Father to Hearing.

A neceſſary Defendant being beyond Sea, upon Affidavit made thereof, and that Plaintiff knew not whether he was living or dead, he had an Order upon Motion to proceed againſt the other Defendants without prejudice, and afterwards had a Decree without bringing ſuch Defendant to Hearing.

Willett

Caſe 474.
Eodem die.
In Court, Lord Chancellor.

Willett verſus *Winnell.*

THE Plaintiff was the youngeſt Son of his Father, who was ſeized, according to the Cuſtom of the Manor of *Wolverly*, of a Copyhold Tenement of the nature of *Burrough Engliſh* of the Value of 15 *l. per Ann*; and in *April* 1671, the Plaintiff's Father having borrowed 200 *l.* of the Defendant's Father, for ſecuring the ſame made a Conditional Surrender into the hands of two cuſtomary Tenants of the Manor, to be void on Payment of the 200 *l.* and Intereſt in *April* 1672; and at the ſame time the Defendant's Father entered into a Bond, conditioned that if the 200 *l.* and Intereſt ſhould not be paid at the Day, then if the Defendant's Father ſhould pay to the Plaintiff's Father, his Executors, Adminiſtrators or Aſſigns, the further Sum of 78 *l.* in full for the Purchaſe of the Premiſes within *ten* Days afterwards, that the Bond ſhould be void, or otherwiſe ſtand in full Force.

The Plaintiff's Father died in *November* 1671, before the Mortgage was Forfeited, leaving the Plaintiff an Infant of *two* Years old; and the 200 *l.* with Intereſt not being paid at the Day, the Defendant pays the 78 *l.* the next Day after the Mortgage was Forfeited, to the Adminiſtrator of the Plaintiff's Father, according to the Condition of the Bond.

The Plaintiff's Bill was to redeem, on Re-payment of the 200 *l.* with Intereſt, diſcounting the Profits. The Defendant by Anſwer inſiſted it was an abſolute Purchaſe.

The Court decreed a Redemption, making no doubt but it continued a Mortgage, and was not an abſolute Purchaſe: but as to the 78 *l.* declared that to be well paid to the Adminiſtrator, and therefore Ordered the whole Moneys with Intereſt to be repaid and Coſts, diſcounting the meſne Profits.

Edwin verſus *Thomas.*

Caſe 475.
25 Novembris.
In Court, Lord Chancellor.

THE Bill was to be relieved touching the Truſt of a Copyhold Eſtate. In the Debate of this Caſe it was alledged, and ſo it appeared by an Antient Book of Survey, that by the Cuſtom of the Manor of which the Eſtate was held, Copyhold Lands there ſhould not only go to the youngeſt Son, but alſo in caſe the youngeſt Son died without Iſſue, it ſhould go to his youngeſt Brother and not to the eldeſt; and if no Sons, that it ſhould go to the youngeſt Daughter; and likewiſe that if the Copyholder had had ſeveral Wives, the Lands ſhould go to the youngeſt Son by the firſt Wife. And the Principal Queſtion in this Caſe being, whether upon the Death of the youngeſt Son it ſhould go to his next youngeſt Brother or to the eldeſt, the *Chancellor* directed an Iſſue for Tryal of the Cuſtom.

In ſpeaking to this Caſe, the *Chancellor* cited a Caſe adjudged by the Lord Chief Juſtice *Hales*, that a Rent-charge created *de novo* iſſuing out of Gavel-kind Lands ſhould follow the nature of the Land, and deſcend in Gavel-kind.

Rent-charge in Fee granted out of Gavel-kind Land ſhall deſcend in Gavel-kind.

Sir *Bazil Firebraſſe* verſus *Brett.*

Caſe 476.
26 Novembris.
In Court, Lord Chancellor.

THE Defendant and Sir *William Ruſſell* dining with the Plaintiff at his Houſe, after Dinner fell into Play with the Plaintiff, and won of him in ready Money about 900 *l.* which *Brett* brought away with him (tho' when they began to Play the Defendant and Sir *William Ruſſell* had not above eight Guineas between them) and Sir *Bazill* being ſomewhat inflamed with Wine brought down a Bag of Guineas containing about 1500 *l.* and *Brett* won that Money alſo, and had it in his Poſſeſſion; but as he was going away with it out of the Houſe, *Firebraſſe* and his Servants ſeized upon it, and took it from him. *Firebraſſe* had

Injunction granted for ſtay of Proceedings at Law for forceably taking from Defendant Money, which he had won of the Plaintiff at Play, tho' the Defendant had by Anſwer denied all the Circumſtances of Fraud charged in the Bill.

had brought an Information againſt *Brett* for Playing with falſe Dice; but *Brett* was acquitted: And *Brett* had brought an Action of Treſpaſs againſt *Firebraſſe* for taking from him in a forceable manner this Bagg of Guineas, and thereupon *Firebraſſe* exhibited his Bill charging many Circumſtances of Fraud and Circumvention, which were denyed by the Defendant's Anſwer; and upon the Plaintiff's Motion the *Lord Chancellor* granted an Injunction 'till the Hearing of the Cauſe, and ſaid, that he thought the Sum very Exorbitant for a Man to loſe at Play in one Night, and that if it was in his Power he would prevent it; and cited the Caſe of Sir *Cecill Biſhop* and Sir *John Staples*, in the Lord *Chief Juſtice Hales*'s time, about a Wager upon a Foot-race, and that the *Chief Juſtice* in that Caſe ſaid, that thoſe great Wagers *Proceeded from Avarice and were founded in Corruption.*

Caſe 477.
At the Rolls, Maſter of the Rolls.

Willett verſus *Earle.*

Rent incurred in the Life-time of a Teſtator, tho' reſerved upon a Parol Leaſe, ſhall be paid before Bond Debts,

UPON a Special Report, the Point in Queſtion was, whether an Executor, who had paid the Arrears of Rent reſerved upon a Parol Leaſe incurred in the Life-time of the Teſtator, had well paid and Adminiſtred this Money, ſo as to bar the Plaintiffs, who were Creditors by Bond.

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In what Caſes a Man ought to make Oath of the Loſs of a Deed, and in what not; where he brings a Bill for Relief, or Diſcovery touching ſuch Deed. 59, 180, 247, 310

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A Widow before her ſecond Marriage aſſigns over ſeveral Goods to Truſtees for the Benefit of her Children by her firſt Husband, and the ſecond Husband having ſuppreſſed this Deed, which was made without his Privity, and whereby the Particulars of the Goods might appear, he was decreed to pay 800 *l.* which was proved to be the Sum mentioned in the Deed to be the Value of the Goods. 408

Demiſe le Roy.

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Diſcretion.

Perſonal Eſtate deviſed to the Wife upon Truſt not to diſpoſe thereof, but for the Benefit of her Children; ſhe by Will gives 5 *s.* to one only. Decreed the Eſtate to be equally divided. 66

A. gives a Legacy of 1000 *l.* to his Wife, willing her to give 500 *l.* of it to his Grandaughter, to be paid at ſuch Time as his Wife ſhould think fit and beſt for his Grandaughter: The Wife lived twenty Years afterwards, and died without paying the Legacy. Decreed the Legacy to be paid with Intereſt from the Teſtator's Death, though never demanded in the Life of the Wife. 257

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In Fee-Tail.

Tenant in Tail of an Equity of Redemption, may deviſe it for the Payment of Debts. 41

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Term attendant on the Inheritance.

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The Cuſtom of *London* ſhall not prevent the Attendance of a Term on the Inheritance. 2

A. having a Term in his own Name, purchaſes the Inheritance in the Name of a Truſtee: The Term ſhall attend the Inheritance, tho' there is no Declaration for that Purpoſe. 104

A Purchaſer takes a Term in a Truſtee's Name, and the Inheritance in his own Name: This Term, unleſs declared to attend the Inheritance, will be Aſſets in Equity. 188

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Where Lands eſcheat to the King, he ſhall have the Benefit of a Term attendant on the Inheritance. 357

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Limitations of Terms for Years, Money, &c. Vide Perpetuity.

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A Term for Years is limited in Truſt for *A.* for Life, Remainder to his firſt Son until 21, and after the firſt Son comes to 21, then to ſuch firſt Son for the Remainder of the Term; but if the firſt Son die before 21, then in Truſt for the Second, and every other Son in the ſame Manner; and if no ſuch Son, or if all the Sons die before 21, then to *J. S.* This is a good Limitation. 234, 304

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A. deviſes the Surplus of his perſonal Eſtate to *B.* in Truſt for his only Son, and the Heirs of his Body; and if he died, during his Minority, and without Iſſue, then to *C.* and makes his Son Executor, and *B.* Executor in Truſt during the Son's Minority. The Son lives to 18, and then dies without Iſſue; this perſonal Eſtate ſhall go to the Executor of the Son, and not to *C.* for it veſted in the Son at 17, *that* being the Time when the Executorſhip of *B.* determined, and Minority in both Caſes ended at the ſame Time. 326

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Evidence.

A Man's Anſwer in the ſpiritual Court, or even his voluntary Affidavit before a Juſtice of the Peace, ſhall be read as Evidence againſt himſelf. 53

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A. purchaſes in the Name of *B.* and pays the Purchaſe-Money, *B.* claims the Eſtate, there being no Declaration of Truſt; *A.* may be admit-

admitted to read Proofs, that he paid the Purchaſe-Money; but then they muſt be very clear, to make it a Truſt ariſing by Implication of Law. 366

Depoſitions taken in a former Cauſe, cannot be read in another Cauſe, againſt one who does not claim under the Party againſt whom theſe Depoſitions were taken. 413

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A Bill to examine Witneſſes *in perpetuam rei Memoriam*, is not proper until the Party has eſtabliſhed his Right at Law. 308, 441

Upon a Bill to perpetuate the Teſtimoney of Witneſſes touching a Right to a Way; the Plaintiff muſt ſet out the Way exactly in his Bill *per & trans*, as he ought to do in a Declaration at Law. 312

But ſuch a Bill ought not to be brought for ſuch trivial Things, as Right of Common, or for Ways, or Water-courſes; or at leaſt not till after a Recovery at Law. *ibid.*

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De bene eſſe.

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Where there is an Anſwer to Part, and a Plea to the Reſidue, the Plaintiff cannot except to the Anſwer, till the Plea is argued, or an Order obtained, that it ſhall ſtand for an Anſwer with Liberty to except. 344

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If an Excommunication be not for ſome of the Offences mentioned in the Statute 5 *Eliz.* and the *Significavit* does not mention the Offence, the Remedy by the Statute is a *Habeas Corpus*, and upon the Return of that, the Party ſhall be diſcharged. 24

Executor and Adminiſtrator.

In what Priority Debts are to be paid. Vide Tit. Debts.

Although an Executor does actually releaſe, yet he muſt be made a Party to the Suit. 31

Adminiſtrator brings a Bill for a Diſcovery of the Inteſtate's perſonal Eſtate. It is no Bar to the Diſcovery, that the Adminiſtration is litigated. 106

An Executor pleads he has no Aſſets *ultra* 100*l.* to three ſeveral Actions; Judgment is had in each for 100*l.* upon which he brings his Bill, and moves for an Injunction, which is denied. 119

Plea of Outlawry is no Bar to a Suit brought by one as Executor. 184

If an Executor dies before Probate of the Will, his Executor cannot prove it, but Adminiſtration *cum teſt'o annex'*, muſt be granted to the Reſiduary Legatee, (if any) or to the next of Kin. 200

In a Bill againſt Executors, who are only Executors in Truſt, it is not neceſſary to make the *Ceſtuy que Truſts* or Reſiduary Legatees Parties. 261

An Aſſent to a Legacy by an Executor, though good betwixt the Executor and Legatee, yet it will not bind the Creditors; but the Legacy ſhall be liable in the Legatee's Hands, to the Creditor's Debts. 455

If an Executor for a Shilling releaſe a Debt of 100, though this Releaſe be good betwixt the Executor and the Creditor; yet the Debt though releaſed, ſhall in Equity be Aſſets to a Creditor of the Teſtator. *ibid.*

In Truſt for another.

A Man makes his Will, and his Wife Executrix; the Son prevails on his Mother to get the Father to make a new Will, and name him Executor, he promiſing to be a Truſtee only for his Mother. Truſt Decreed, notwithſtanding the Statute of *Frauds*. 296

One by his Will gives an expreſs Legacy to his Executor for his Care, and makes no Diſpoſition of the Surplus: The Executor is but a Truſtee, and the Surplus is to be diſtributed, as if the Teſtator had died inteſtate. 473

How to be charged, and how to account.

An Executor that uſes the Teſtator's Money in his Trade, or makes Intereſt of it, ſhall be charged with Intereſt. 197

After a Bill brought by a Creditor againſt an Executor, he ſhall not be allowed Payments made voluntarily, without Suit. 369

An Executor in Truſt for an Infant, Reſiduary Legatee renews a Leaſe, Part of the Teſtator's Eſtate in his own Name, and ſells it to one that has Notice of the Infant's Title Purchaſe ſet aſide. 484

Devaſtavit and Converſion.

Although an Infant at 17 may adminiſter, yet he cannot commit a *Devaſtavit* until 21. 328

A. is indebted to *B.* as Adminiſtrator for Rent; and there being an Account betwixt *A.* and the Inteſtate, *A.* and *B.* account together, and *A.* gives a Note to *B.* for 60 *l.* being the Balance: The Adminiſtrator dies Inteſtate, this 60 *l.* ſhall go to the Adminiſtrator of *B.* and not to the Adminiſtrator *de bonis non* of the firſt Inteſtate: The Accounting together, and the Note being an Alteration of the Property. 473, 474

A. owes Money to *B.* who dies Inteſtate, and the Adminiſtrator takes *A*'s Covenant for the Debt, *A.* becomes inſolvent; this is a *Devaſtavit* in the Adminiſtrator. 474

Adminiſtrator durante Minoritate.

Adminiſtrator *durante Minoritate* exhibits a Bill, and an Account is decreed; the Infant marries, and Adminiſtration is granted to the Husband. Whether he can carry on the Account. 25

An Executorſhip, during the Minority of an Infant, determines when the Infant comes to the Age of 17. 326

Expoſition of Words.

A Man being a Widower and having ſeveral Children, by Settlement makes a Proviſion for his younger Children, Sons and Daughters, and then marries again, and has other Children. The Children of the ſecond Marriage ſhall be included within the Words, *younger Children*, and ſhall have an equal Share with the Reſt in this Proviſion. 334

Extent.

Vide **Title Securities.**

Where a Statute is extended, it cannot be tried in an Ejectment, whether ſatisfied or not; but the only Remedy is by *Scire facias ad computandum*, or Bill in Equity; but where Land is extended upon an *Elegit*, the Debt and yearly Value appear on Record, and it may be known when the Debt is paid, and may be given in Evidence upon a Trial in Ejectment. 50

After an Eſtate has been under an Extent

tent for a long Time, and has gone through ſeveral Hands, whether on a Bill to redeem, the Defendant ſhall account otherwiſe, than at the extended Value. 468

A Farmer of the Exciſe having an Eſtate of his own ſufficient to ſatisfy what he owed the King, takes out an Extent in Aid, againſt a Perſon who owed him Money and had failed. He was decreed to refund with Coſts; and declared *per Cur'*, that where an Accountant to the King had ſufficient of his own to ſatisfy the King's Debt; he ought not to take out an Extent in Aid of the King's Debt. 469

Fees.

A Bill may be brought in Chancery for Solicitors Fees only, if for Buſineſs done in that Court. And ſo it may, where the Buſineſs is done in another Court, if it relates to another Demand made in the Bill. 203

Feoffment. Vide Deeds and Conveyances.

Fine.

Vide Truſt how barred, &c.

Fine and Non-claim.

A Truſtee ſells the Land as his own proper Eſtate, and levies a Fine, and five Years Non-claim paſſes, and afterwards the Truſtee repurchaſes the Eſtate. Bar removed. 60

Fine levied by a Truſtee, and five Years Non-claim, does not deſtroy the Truſt, nor ſeparate it from the Land, but transfers them both together. 84

Fine levied by a Mortgagee, and five Years Non-claim will not Bar the Mortgagor of his Equity of Redemption. 132

Fine and Non-claim no Bar, where there is Notice of the Truſt. 149

A. ſeiſed in Fee in Truſt for *B.* for full Conſideration conveys to *C.* who has Notice of the Truſt, and *C.* to ſtrengthen his Title levies a Fine, and five Years paſs, this will not bar the *Ceſtuy que Truſt.* *ibid.*

Ceſtuy que Truſt in Tail with Remainder over, levies a Fine, and dies without Iſſue, and then five Years Non-claim paſſes; the Remainder is barred. 226

Forfeiture.

How far Waiving by the Bill of a Forfeiture, when one Moiety thereof belongs to the Crown, will prevent a Demurrer. 129

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Releaſe avoided, becauſe the Party was not truly informed of what Intereſt he had. 32
Voluntary Settlements made by the Father are fraudulent as to any Mortgage made by himſelf. Otherwiſe as to a Mortgage made by the Son. 46
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Articles and a Conveyance executed, and Fine in Purſuance thereof ſet aſide for Fraud. 205
A. charges his Lands in *D.* with 3000 *l.* for his Daughter's Portion, and afterwards ſettles thoſe Lands for a Jointure on his ſecond Wife, who had no Notice of the Charge. *A.* believing the Portion would take Place of the Jointure, by Will deviſes other Lands in *S.* to his Wife in lieu of the Jointure, which ſhe by Combination with the Heir and to defeat the Portion, refuſed to accept. Decreed the Daughter ſhould hold the Lands in *S.* till her Portion was paid. 219
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Rent-charge in Fee granted out of Gavelkind Land, ſhall follow the Nature of the Land, and deſcend in Gavelkind. 489

Guardian.

A. indebted to *B.* by Deed, grants the Guardianſhip of his Child to *B.* and covenants not to revoke it and dies. Equity will not ſet aſide the Deed, unleſs the Debt be paid, or the Truſt abuſed. 442

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In an Account no Allowance for Diet, where the Party comes as a Gueſt upon Invitation. 19

Heir and Anceſtor.

GOODS are deviſed to *A.* for Life, and after his Death to the Heir of *B.* *B.* dies in the Life of *A.* he that was Heir of *B.* at his Death, and not he, who was his Heir at *A*'s Death, ſhall have the Goods. 35

Hæres factus, or a Deviſee ſhall have the perſonal Eſtate applied in Eaſe of the Real. 36

If in a Bill againſt the Heir for Satisfaction of a Bond-Debt out of Aſſets, it is not alledged the Heir was bound: It is a good Cauſe of Demurrer. 180

A Sum of Money ſecured by Mortgage, is given by Will to younger Children, who are Infants, and for the more ſure Payment of it, the Eſtate of the eldeſt Son is charged with this Money: The Mortgagor during the Minority of the Infants, brings a Bill to redeem his Eſtate, and purſuant to a Decree, pays in his Money to a Maſter, who puts it out upon a Security, which proves bad. The Eſtate of the eldeſt Son ſhall not make it good. 336

If Lands of an Heir are charged with Portions to Infants at 21, or Marriage; the Heir in Eaſe of his Land, ſhall not be admitted to pay in the Portions before they are due. 338

After a Verdict obtained againſt the Heir, in an Action brought upon the Bond of his Anceſtor, and before the Day in Bank, the Heir dies, and deviſes the Lands to *J. S.* the Plaintiff in the Action brings a Bill to affect the Lands in the Hands of the Deviſee with this Debt. Bill diſmiſſed. 400

One pleads himſelf Heir on the Part of his Mother, and does not ſay he is Heir of the whole Blood. Plea over-ruled. 442

Heir.

Matters controverted between the Heir and Executor.

Hæres factus, or Deviſee ſhall have the perſonal Eſtate applied in Eaſe of the Real. 36

A Man purchaſes an Equity of Redemption, and dies, the Mortgage ſhall not be paid out of the perſonal Eſtate for the Benefit of the Heir; it not being the Anceſtor's Debt. 37

Baron and Feme mortage the Wife's Land; the Husband pays in Part of the Principal, and afterwards borrows the ſame Sum again: the Heir of the Wife ſhall not redeem without paying both Sums. 41

Bond given by one Parcener, to pay to the other, his Executor or Adminiſtrator, an annual Sum during the Life of *J. S.* for *Owaltie* of Parti-

Partition ſhall go to the Executor, and not to the Heir. 133

If a Term is ſettled in Truſt for a Man and his Heirs, it ſhall go to his Executors. 164

A Feme Mortgagee in Fee of a Copyhold, marries and dies: Whether the Husband as Adminiſtrator to his Wife, or the Heir ſhall have the Benefit of the Mortgage, there being no Covenant to pay the Money. 170

Term raiſed out of the Inheritance, and lodged in Truſtees for raiſing Portions for younger Children, payable at 21, or Marriage; a Daughter dies an Infant and unmarried; the Portion ſhall not go to the Adminiſtrator, but ceaſe for the Benefit of the Heir. 204

A Mortgagee in Fee being in Poſſeſſion, ſells the Eſtate as abſolute Owner. As between the Heir and Executor of the Purchaſer, it ſhall be conſidered as a real Eſtate, and go to the Heir. 271

Bill for a Horn as an Heir-loom. 273

Lands deviſed to be ſold for Payment of Portions to three Daughters, one dies after the Portion becomes due, and before the Land is ſold. The Adminiſtrator ſhall have the Portion. 276

A Sum of Money is agreed on Marriage to be laid out in Land, and ſettled to the Uſe of Baron and Feme, and their Iſſue, with Remainder to the Baron in Fee; the Baron dies leaving a Daughter, who died without Iſſue: The Heir of the Baron brought a Bill againſt the Widow and Adminiſtratrix of the Baron, who was alſo Adminiſtratrix of the Son, to have the Money laid out, and the Bill was diſmiſt: But that Diſmiſſion was afterwards reverſed, and a Decree made in Favour of the Heir. 298, 9

Lands are limited to the ſecond Son in Fee, provided that if the eldeſt Son die without Iſſue, the ſecond Son ſhould within ſix Months after pay 1500 *l.* to his Siſter, or in Default thereof, the Lands ſhould go to the Siſter and her Heirs: The eldeſt Son died without Iſſue; the Siſter died before the Day of Payment; and the ſecond ſon refuſed to pay the 1500 *l.* the Heir, and not the Executor of the Siſter, ſhall have the Benefit of the Deviſe over. 402

Catching Bargains.

Heir having ſold the Reverſion of an Eſtate, expectant on the Death of his Father, at an Under-value, was relieved againſt ſuch Sale. 167

If an Heir ſells ſuch a Reverſion in the Life of his Father at an Under-value, a Court of Equity will not decree him ſpecifically to perform a Covenant for further Aſſurance. 271

An Heir buying Goods of a Tradeſman, and agreeing to pay five Times the Value at his Father's Death, was relieved on Payment of what was really due; and tho' in this Caſe three young Heirs bought the Goods jointly, and were bound together to the Tradeſman, yet each of them relieved on Payment of what was due, for the Goods which he had. 467

Incumbrances bought in by the Heir. Vide Under Title Securities.

Heriot.

An Heriot is not due upon the Death of the *Ceſtuy que Truſt*, but of him that has the legal Eſtate. 441

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Ideot and Lunatick.

THE Cuſtody of an Ideot cannot be granted to a Man, his Executor, Adminiſtrators and Aſſigns. 9

A Bill will not lie in a Lunatick's Lifetime, to perpetuate the Teſtimony of Witneſſes to his Will made before his Lunacy. 105

One found a Lunatick, and having afterwards recovered his Underſtanding, moved that he might be inſpected, and be at Liberty to make a Settlement of his Eſtate. 155

Committee of a Lunatick cannot make Leaſes, nor incumber the Lunatick's Eſtate, without Leave of the Court. 262

Mortgage made by a Lunatick, when *Sane*, and more Money afterwards taken up by the Committee upon the ſame Mortgage. It ſhall ſtand a Security only for the firſt Sum. *ibid.*

Committee not allowed for Buildings and Improvements on the Lunatick's Eſtate. 263

A Committee having demanded an Allowance for the Maintenance of the Lunatick's Son, it was referred to a Maſter to ſee what was a fitting Maintenance. *ibid.*

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Eſtate per Implication.

Deviſe to a Stranger after the Death of the Wife, ſhall not give an Eſtate for Life to the Wife by Implication; but otherwiſe if it had been ſo deviſed to the Heir. 22

My Debts and Legacies being firſt deducted, I deviſe all my Eſtate, real and perſonal, to J. S. This implies a Deviſe for Payment of Debts. 45

Impropriator. Vide Parſon.

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Infant.

An Executor, though ſued in the Spiritual Court for a Legacy given to an Infant, may bring a Bill in Equity for his own Indempnity, and to have the Money ſecured for the Infant's Benefit. 26

Money expended for Maintenance, and Education ſhall be allowed out of a ſmall Legacy given to an Infant, though it breaks into the Principal; otherwiſe, where the Legacy is conſiderable. 255

An Infant may be a Truſtee. 343

Truſtees for an Infant having ſaved 3000 *l.* out of the Profits of his Eſtate, lay it out in a Purchaſe of Lands lying near the Infant's Eſtate, with the Conſent of his Grandmother, declaring the Truſt for the Benefit of the Infant, if he,

when of Age, ſhall agree to it; Infant dies within Age: The Truſtees ſhall account to the Infant's Executors for the 3000 *l.* but the Profits of the Land ſet againſt the Intereſt. 435

What Acts by an Infant ſhall be good and binding.

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An Infant at 17 may make a Will. 255

And at 17 may take Adminiſtration. 328

A Petition to the King to direct his Judges to take a Fine or Recovery from an Infant, referred to the Lord Chancellor. 461

A Fine cannot be taken from an Infant, but a Recovery may by the King's ſpecial Direction. *ibid.*

Privilege and Favour towards an Infant, in what Caſes, and what not.

An Infant intitled to the Truſt of Lands in Fee, marries without the Conſent of her Father. The Father brings a Bill that a Proviſion might be made for the Wife and Children out of theſe Lands. *Non Allocat'.* 39

Whether the Parol ſhall demur in Equity, in Caſe of a Deſcent of a Truſt on an Infant. 173, 428

An Infant ſhall not be fore-cloſed, without having a Day to ſhew Cauſe when he comes of Age: But the proper Way is to decree the Land to be ſold, and that will bind an Infant. 295

An Infant ſhall have an Account of Profits againſt an Intruder, as againſt a Guardian; but where there is a Verdict againſt the Infant's Title, he can have no Account of Profits, till he has recovered at Law. *ibid.*

Where a Verdict paſſes againſt the Father of an Infant, Laches ſhall run againſt the Infant 296

Although an Infant at 17 may adminiſter, yet he cannot commit a *Devaſtavit*, till he is of full Age. 328

Whether a Court of Equity will decree a Satisfaction of a Bond-Debt of the Anceſtor, during the Infancy of the Heir, out of the Profits of the Lands deſcended, when there is no perſonal Eſtate. 173, 428

Infranchiſement. Vide **Copyhold.**

Injunction.

A. after Judgment in Ejectment and a Writ of Poſſeſſion taken out againſt him, brings a Bill and has an Injunction on a *Dedimus*. This Injunction was allowed to extend to the Under-Sheriff, who was in Contempt to an Attachment in *K. B.* before the Bill filed for not executing the Writ of Poſſeſſion. 25

Bailiffs, who had ſerved an Execution in Breach of an Injunction, carry away Money, which they find hid in the Houſe; Plaintiff in the Execution ordered to make Satisfaction. 207

The Court refuſed to grant an Injunction

junction in Favour of the King's Patentee, to ſtay the Sale of Bibles printed beyond Sea, until the Validity of the Patent had been tried at Law. 120, 275

No Injunction to quiet Poſſeſſion, but where the Party has been in Poſſeſſion for three Years before filing the Bill, or where the Cauſe has been heard, and the Merits determined. 156

If a Member of Parliament ſues at Law, and a Bill is brought to be relieved againſt that Action, the Court will grant an Injunction till Anſwer and farther Order. 329

Injunction granted to ſtay Proceedings at Law, for forcibly taking from the Defendant, Money which he had won of the Plaintiff at Play; though the Defendant by Anſwer had denied all Circumſtances of Fraud charged by the Bill. 489

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Intereſt of Money.

Mortgagee aſſigns his Mortgage to *J. S.* who pays off the Principal and Intereſt, which was conſiderably in Arrear, the Mortagagee not joining. Whether the Intereſt ſhall carry Intereſt. 168

Jointenants, and Tenants in common.

Vide **Survivor.**

Deviſe to two, equally to be divided between them, makes a Tenancy in common. 32

A Deviſe of a Term to *A.* and *B.* paying 25 *l.* a Year out of the Rents to one during his Life; *viz.* 12 *l.* 10 *s.* by each of them. This is a Tenancy in Common. 353

If two joint Purchaſers pay an equal Share of the Purchaſe-Money, this makes them Tenants in Common in Equity. 361

Jointure.

The Heir is not intitled to ſee any Deeds in the Hands of the Jointreſs, without confirming her Jointure, though the Jointure was made after the Marriage. 479

Ireland.

Bill lies here touching a fraudulent Conveyance of Lands in *Ireland*, when the Defendant is in *England*. 75, 405, 419

Bill in Equity in *England* for a Partition of Lands in *Ireland* diſmiſſed, but an Account of the Profits decreed. 421

Judges in *England*, proper Expoſitors of the Laws in *Ireland*. 422

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Juriſdiction.

Vide **Courts.**

The Chancery has an Admiral Juriſdiction. 54

Letters of Repriſal may be repealed in Chancery after a Peace, though there

there is a Clauſe in the Letters Patents, that no Treaty of Peace ſhall prejudice them. *Ibid.*

In pleading in a Court of Equity a Juriſdiction by Act of Parliament excluſive of all other Courts, it muſt be averred, that there is a Court of Equity within ſuch Juriſdiction. 58

Bill lies here touching a fraudulent Conveyance of Lands in *Ireland*, when the Defendant is in *England*. 75

The Juriſdiction of Chancery, even of the Latin Side not ſubjected unto, nor to be controlled by the King's Bench. 131

The Chancellor's Court in *Oxford* hath no Juriſdiction touching Matters of Freehold. 212

The Court of Chancery has a natural Juriſdiction in the Caſe of Forgery. 292

Laches.

ONE *Huckſtep* by Will deviſes Lands to be ſold, and there is a Direction in the Will, that if any of the Name of *Huckſtep* would purchaſe them for his own Uſe, the Truſtees ſhould ſell to him for 200*l.* leſs than the reaſonable Value. One of the Teſtator's Name, twenty-five Years after his Death, brings a Bill for this Preemption. Bill diſmiſſed. 362

Leaſe and Covenants therein.

Leſſee, where there is a Covenant by him to repair, makes an Underleaſe to *J. S.* who is in Poſſeſſion: Under-leſſee not liable to the Covenant in Law; nor in Equity, unleſs the firſt Leſſee is inſolvent. But *Quære* if then liable. 87

Legacies and Legatees.

Legacies left to be applied at Diſcretion. Vide Diſcretion.

10000*l.* left by Will to procure a Dukedom to the Head of a Family. 5

If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition ſhall go. 93

Charitable Legacies by the Civil Law, are to be preferred to other Legacies. 230

A Legacy not within the Statute of Limitations. 256

Where a Legacy is given to a Feme Covert, Payment to her alone is not good. 261

Where a Legacy is payable at a certain Day, it ſhall carry Intereſt from that Time, if not paid. 262

Legacies, or Portions veſted or lapſed.

Legacy given to an Infant to put him out Apprentice, and he dies before he is of a competent Age to be put out; it ſhall go to his Executor. 255

Where a Legacy is *Debitum in præſenti*, though not payable till a future Day, it ſhall go to the Executor or Adminiſtrator of the Legatee, if he dies before the Day of Payment. 324

And ſo it ſhall, if a Sum of Money is deviſed to be paid out of Land; for

for it is conſidered only as a Legacy. 324

A. deviſes his perſonal Eſtate to *B.* in Truſt for his Son and the Heirs of his Body, and if he died during his Minority, and without Iſſue, then to *C.* and makes his Son Executor, and *B.* Executor in Truſt for the Son during his Minority; the Son attains eighteen, and dies. This perſonal Eſtate ſhall go to the Executor of the Son, and not to *C.* the Eſtate veſting in the Son at ſeventeen, for *Minority* in this Caſe muſt be underſtood to determine at the Time, when the Executorſhip of *B.* determined, which was when the Son attained 17. 326

A Man by a Settlement makes a Proviſion for raiſing 100 *l.* a-piece for his younger Children, to be paid according to their Seniority, and a Maintenance in the mean Time; ſome of the Children die in the Life-time of their Father; their Portions ſhall not be raiſed in Favour of their Adminiſtrators; for no certain Time being appointed for Payment of the Portions, they did not naturally attach till the Death of the Father. 335

Otherwiſe if any of the Daughters had married, and died in the Life of their Father. *Ibid.*

A Portion deviſed to a Child with Intereſt, but not to be paid or payable until the Child attain 21, or was married; the Child dies under 21, and unmarried. Decreed the Portion to be paid to the Adminiſtrator of the Child. 462

Abatement and Refunding.

In Caſe of Deficiency of Aſſets, a ſpecifick Legatee ſhall not abate in Proportion with pecuniary Legatees. 31

But one pecuniary Legatee ſhall abate in Proportion with the Reſt, though his Legacy is directed to be paid in the firſt Place. *Ibid.*

A Creditor ſhall compel a Legatee to refund, and ſo ſhall one Legatee another, where Aſſets are deficient. 94, 162

Whether an Executor, after he has voluntarily aſſented to a Legacy, can compel the Legatee to refund. 94

Difference between a voluntary Aſſent to a Legacy, and an Aſſent by Compulſion. *ibid.*

Lands deviſed for Payment of Debts and Legacies; the Debts and Legacies ſhall be paid *pari paſſu*, but that Decree reverſed *per* Lord *North*, who gave Preference to the Debts; but Lord *Jefferies* diſſatisfied with this Reverſal. 482

Surplus, and Reſiduary Legatees.

A. deviſes the Surplus of his Eſtate to his two Nephews, equally to be divided, and appoints his Executor to lay it out for the Benefit of his ſaid two Nephews, one of the Nephews dies in the Teſtator's Life-time. The ſurviving Nephew ſhall have the whole Surplus: The later Words, whereby the Whole is appointed to be laid out for the Be-

nefit of the Nephews being joint, and no Benefit intended for the Executor. 425

A. gives 800 *l.* to his Executor, in Truſt to pay Annuities to *B.* and *C.* for their Lives, exceeding the Intereſt of the 800 *l.* and gives the Surplus of his Eſtate to *D.* The Annuitants being dead, the 800 *l.* ſhall go to the Reſiduary Legatee, and not to the Executors. *ibid.*

Aſſent to a Legacy.

A ſmall Matter will amount to an Aſſent to a Legacy, it being a rightful Act. 94

Aſſent to a Legacy, or voluntary Releaſe by an Executor, ſhall not bind a Creditor. 455

Ademption of a Legacy.

A. by Will gives 400 *l.* to be laid out in finiſhing an Houſe, *C.* lives to lay out as much himſelf, but leaves the Houſe unfiniſhed: The 400 *l.* ſhall not be laid out. 95

Letters Patent. Vide **Patent.**

Limitation. Vide **Condition.**

Statute of Limitations.

The Statute of Limitations attaches a Demand pending a Bill in Equity; and though the Bill is diſmiſſed by Reaſon the Matter is proper at Law; yet the Court will not ſuffer the Statute to be pleaded at Law. 73

A Legacy not within the Statute of Limitations. 256

Statute of Limitations is no Plea in Bar to an open Account. 456

Lis Pendens. Vide **under** Title **Bill.**

London.

The Cuſtom of *London* ſhall not prevent the Attendance of a Term on the Inheritance. 2

A Citizen having made a Settlement upon his Wife in Marriage, in lieu of her cuſtomary Share, and having one Son and two Daughters, deviſes two Thirds of his whole Eſtate to his Daughters, and one Third to his Son. How it ſhall be divided. 6

Sums of Money given by a Freeman to a Daughter, if not given as a Marriage-Portion, or in Purſuance of a Marriage-Agreement, no Advancement; but however ſhall be brought into Hotchpot. 61, 89, 90

Chymical Receipts to be reckoned no Part of a Freeman's perſonal Eſtate. 63

An

An Orphan being married dies under 21, her orphanage Part ſhall go to her Husband, and not ſurvive to the other Children. 88

Any Proviſion made by a Father for a Child, is an Advancement within the Cuſtom, unleſs the Father by Writing declare the Contrary: And for ſome Time held, that in ſuch Writing the Sum muſt be mentioned, becauſe of bringing it into Hotchpot. 89

A Freeman of *London* having a Term in his own Name, purchaſes the Inheritance in the Name of a Truſtee, and there is no Declaration, that the Term ſhall attend the Inheritance. This Term ſhall attend the Inheritance, and not be ſubject to the Cuſtom. 104

The teſtamentary Part of a perſonal Eſtate of a Freeman of *London* dying inteſtate, held upon arguing a Plea, not to be diſtributable by the Statute of Diſtributions. 133

But decreed *contra* in the Caſe of a Perſon dying inteſtate within the Province of *York*. 134

A Freeman leaves *London*, and lives twenty Years in the Country, then marries and makes his Wife a Jointure, and dies; the Wife ſhall have her cuſtomary Share of the Husband's perſonal Eſtate. 180

A Freeman having two Daughters his Coheirs, ſettles Lands of Inheritance on one of them in Marriage: The Queſtion was, if this Settlement was an Advancement within the Cuſtom. 181

Admitted that in the Caſe of a Son and Heir it would not be an Advancement. *ibid.*

The Cuſtom certified, that a Settlement of a real Eſtate was no Advancement, either of an Heir or Coheir, though the Father ſhould afterwards declare the ſame to be a full Advancement. 216

A Freeman advances a Child in Marriage with a Portion; ſuch Child is barred of the orphanage Part, unleſs the Certainty of ſuch Portion appears by Writing under the Father's Hand. *ibid.*

Money brought into *Hotchpot* by an Orphan, ſhall be brought into the orphanage Part only. 345

Money given by a Freeman of *London*, to be laid out in Land, and ſettled on his eldeſt Son for Life, Remainder to his firſt and other Sons in Tail, ſhall not be reckoned any Part of his Advancement, and be brought into Hotchpot. *ibid.*

A Daughter of a Freeman of *London* marrying without her Father's Conſent, loſes her orphanage Part of his perſonal Eſtate, unleſs he is reconciled to her before his Death. 354

Grandchildren of a Freeman are not intitled to a Share of his perſonal Eſtate by the Cuſtom of *London*. 397

By the Cuſtom of *London*, if a Surety in a Bond is ſued alone, he ſhall make his Co-ſureties contribute. 456

So by the Cuſtom, where a Surety in a Bond pays the Debt, though he has no Counter-bond; yet he may maintain an Action againſt the Principal. *ibid.*

The Wife of a Freeman, who dies inteſtate, where there is no Child, is intitled to one Moiety by the Cuſtom, and to a Moiety of the remaining Moiety by the Statute of Diſtributions. 465

Lord and Tenant. Vide **Manor.**

Lunatick. Vide **Ideot.**

Manor.

A Decree for confirming an Agreement betwixt the Lord of a Manor and his Tenants, for settling Heriots, and stinting the Common, revived by a Bill brought by the Purchaser of the Manor, and confirmed, tho' the Lord and his Tenants were only Tenants for Life. 427
But *Quære*.

Marriage.

Vide **Agreements on Marriage, under** Title **Agreement.**

If a Daughter of a Freeman of *London* marries without her Father's Consent, she loses her orphanage Share of his personal Estate, unless he is reconciled to her before his Death. 354
Marriage Brocage Bond decreed to be delivered up, the Marriage being had without the Consent of the Woman's Parents. 412
A. and *B.* being about to marry, surrender their respective Copyhold Estates to the Use of them two, and the Survivor: The Man dies before the Marriage; the Woman enters upon the Land, and after thirty Years quiet Enjoyment, she is decreed to surrender to the Heir, and account for the Profits. 433

Restraints on Marriage.

A Legacy given to a Feme on Condition she marry with the Consent of *J. S.* is only in *Terrorem*, if not given over. 20

Master and Servant.

Bill for an Account of Money received for one, who became a Bankrupt. Defendant pleads, he received the Money as a menial Servant to the Bankrupt, and had accounted for it to him. Plea overruled. 95
A Servant shall not account for what he received, and paid over to his Master, or to his Order. 136, 208
A. an Attorney during the Sickness whereof he died, takes *B.* as his Clerk, and receives with him 120 *l.* and by Articles agrees with the Father to return 60 *l.* of the Money, if *A.* died within a Year; *A.* died within three Weeks, the Executor of *A.* is decreed to pay back 100 Guineas. 460

Merger.

The Lord of a Manor, where by the Custom he has the Cut of the Woods growing on the Lands, grants all the Woods and Underwoods growing, and to grow on the Copyhold, to the Copyholder and his Heirs; this shall not merge in the Copyhold. 21

Messen-

Messenger.

A Messenger awarded on a *Cepi Corpus* returned by the Sheriffs of *London*. 116, 154
A Messenger is but a new Officer, and subordinate to the *Serjeant* at Arms. 344

Monopoly. Vide under Title Trade.

Mortgage.

As touching the Buying in of Incumbrances, and what Use may be made thereof. Vide Title Securities.

A Man purchases an Equity of Redemption, and dies, the Mortgage shall not be paid out of the personal Estate, for the Benefit of the Heir; it not being the Debt of the Ancestor. 37
Tenant in Tail of an Equity of Redemption may devise it for Payment of Debts. 41
A Mortgage made by the Testator subsequent to his Will, shall be only a Revocation *pro tanto*, and so it is after a Settlement with Power of Revocation. 97, 141, 182
A Mortgagee in Fee being in Possession, sells the Estate as absolute Owner. As between the Heir and Executor of the Purchaser, it shall be considered as a Real Estate, and go to the Heir. 271
A Mortgage subsequent to a Will, is a Revocation in Law, but not a total Revocation in Equity. 329

Special Agreements about Mortgages, and Redemptions special.

A Mortgage is made redeemable only during the Life of the Mortgagor. Decreed his Heir should redeem. 7
But this Decree was afterwards reversed upon a Bill of Review. 214, 232
Proviso in a Mortgage, that the Mortgagor, or the Heirs Male of his Body might redeem, the Assignee may redeem. 33
Mortgage made in 1673, in which is a special Clause of Redemption, *viz.* that if the Mortgagor or the Heirs Male of his Body, should in *June* 1686, pay the principal Sum and Interest in the mean Time; then the Mortgagor, or the Heirs Male of his Body might re-enter. The Wife of the Mortgagor, who had a Jointure of Part of the Lands, decreed to redeem. 190
A. mortgages to *B.* his Brother, and agrees, if he has no Issue Male, that his Brother shall have the Land; such an Agreement may be decreed in Equity. 193, 4
Mother Tenant for Life, Remainder in Fee to her Son, they convey Lands to *B.* in Fee, who is put into Possession; but under an Agreement, that if the Money be repaid in ten Years, *B.* shall reconvey. The Son without the Mother brings a Bill to redeem; the Profits much exceed the Interest. Decreed *B.* to account for the Profits, and not permitted to set the Profits against the Interest. 476

In Caſe of a *Welſh* Mortgage, where a Mortgagee is put into Poſſeſſion, and the Conveyance to be void on Payment of the Mortgage-Money, though the Agreement be to retain the Profits againſt the Intereſt; yet if the Value be exceſſive, the Court will decree an Account, even of the mean Profits, notwithſtanding the Agreement for retaining the Profits in lieu of Intereſt. 477

Mortgage, Redemption, Foreclofer.

As touching Redemption of Lands extended upon a Judgment, Vide *Judgment,* &c. *under* Title *Securities.*

Equity of Redemption of a Mortgage for Years, or in Fee, Aſſets to pay Bond-Debts. Vide *Aſſets.*

A Mortgage is made redeemable only during the Life of the Mortgagor; yet the Mortgagor may be foreclofed in his own Life-time. 8

Once a Mortgage and always a Mortgage. *ibid.*

Two Mortgages; one worth redeeming, the other not; the Heir ſhall not redeem the one without the other. 29, 245

Baron and Feme mortgage the Wife's Land; the Husband pays off Part of the Principal, and afterwards borrows the ſame Sum again upon the ſame Mortgage. The Heir of the Wife ſhall not redeem without paying both Sums. 41

A Fine levied by a Mortgagee, and five Years Non-claim will not bar the Mortgagor of his Equity of Redemption. 132

Mortgagee foreclofes, and then agrees with the Creditors, who were Parties to the Suit, to convey to them on Payment of his Money in twelve Months. Redemption decreed to the Creditors after twenty Years Poſſeſſion, and great Improvements made. 138

He that comes to redeem a Mortgage muſt ſhew, he has a Title to the Equity of Redemption. 182

A Mortgagor admitted to redeem before the Day of Payment. 183, 394

If Part of a Mortgage be within a Jointure, *that* gives the Jointreſs a Title to redeem the Whole. 190

Reſtrictions of Redemptions in Mortgages, diſcountenanced in Equity. 191

An Eſtate cannot at one Time be a Mortgage, and afterwards become an abſolute Purchaſe, by one and the ſame Deed, 192, 215

A Mortgage cannot be a Mortgage of one Side only. *ibid.*

One that claims under a voluntary Conveyance may redeem a Mortgage. 193

An Annuity is granted out of Land with a Clauſe of Entry, and Detainer till Payment, and made redeemable on Payment of a Sum of Money: The Grantor cannot be foreclofed of the Land, tho' he may of the Annuity. 209

Mortgagee lends more Money to the Mortgagor on Bond; the Mortgagor ſhall not redeem without paying the Bond-Debt, as well as the Mortgage-Debt. 244

Nor

Nor ſhall the Heir of the Mortgagor redeem without paying both Debts. 245

If there are two Mortgages, and one is defective, if the Heir will redeem, he muſt take both. *ibid.*

What Circumſtances may induce a Court of Equity, to make an abſolute Conveyance redeemable. 268

An Infant cannot be foreclosed without having a Day to ſhew Cauſe, when he comes of Age; but the proper Way is to decree a Sale, and *that* will bind the Infant. 295

If a Stranger gets an Aſſignment of a Mortgage for leſs than is due, the Mortgagor or his Heir ſhall not redeem without paying the Whole that is due. 336

An Agreement is made between the Mortgagor and Mortgagee, that the Mortgagee ſhall enter, and hold until he is ſatisfied. Length of Time no Objection againſt a Redemption. 418

When the Money ſhall be paid to the Heir, when to the Executor, or to whom.

A. ſeiſed in Fee of diverſe Lands, and having alſo Lands mortgaged to him, deviſes all his Lands to *B.* and his Heirs: The mortgage Lands do not paſs. 3

A Mortgagee in Fee deviſes the mortgaged Lands to *A.* for Life, Remainder to *B.* in Fee: *A.* ſhall have one Third, and *B.* two Thirds of the mortgaged Money. 70

Feme Mortgagee in Fee of a Copyhold marries, and dies, living the Husband: Whether the Husband as Adminiſtrator to the Wife, or the Heir ſhall have the Mortgage-Money, there being no Covenant to pay the Money. 170

A forfeited Mortgage in Fee, tho' an old Mortgage, and though the Money by the Proviſo is made payable to the Heir, yet it is perſonal Eſtate, and ſhall go to the Executor. 412

Mortgage aſſigned over.

Mortgagee aſſigns his Mortgage to *A.* who pays off the Principal, and the Intereſt, which is conſiderably in Arrear; but the Mortgagor no Party to the Aſſignment. Whether the Intereſt ſhall be turned into Principal, and carry Intereſt. 168, 194

How and in what Manner Mortgagee ſhall account, and what Allowances he ſhall have.

Mortgagee ſhall not account for more than he actually receives, unleſs where he has been guilty of a wilful Default, or where he has turned out or refuſed a ſufficient Tenant. 45

Intereſt upon Intereſt allowed for ſo much as is reſerved in the Deed, becauſe it is in the Nature of a Debt, and Damages at Law might be recovered for it. 194

A Mortgagee obtains Judgment in Ejectment, but refuſes to take out Execution, and permits the Mortgor to take the Profits, having Notice of a ſubſequent Security; he ſhall be compelled to take Poſſeſſion, or anſwer for the Profits, as in Caſe of wilful Default. 258

Mortgagor becomes a Bankrupt, and the Mortgagee refuſes to enter; but permits the Bankrupt to receive the Profits, and to fence with this Mortgage againſt an Ejectment brought by the Aſſignees. Mortgagee charged with the Profits from the Time of the Ejectment. 267

Mortgagee enters, and thereby prevents ſubſequent Incumbrancers from entring, and yet permits the Mortgagor to receive the Profits. The Mortgagee ſhall be charged with all the Profits he had, or might have received ſince his Entry. 270

If a Mortgagee manages the Eſtate himſelf, he ſhall not be allowed for his Trouble: Otherwiſe if he employs a Bailiff. 316

Notice.

Acts and Intereſts avoided by Reaſon of Notice.

Vide Purchaſer.

Vide Agreement.

IN pleading a Purchaſe, the Defendant ought to deny Notice. 179

A. purchaſes of *B.* who was ſeiſed in Truſt for *C.* having Notice of the Truſt; afterwards *A.* to ſtrengthen his Title levies a Fine, and five Years Non-claim paſs. This is no Bar; for *A.* having purchaſed with Notice, notwithſtanding any Conſideration paid, is but a Truſtee for *C.* and ſo the Eſtate not being diſplaced, the Fine cannot bar. 149

What ſhall amount to a ſufficient Notice.

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Notice of Letters Patent, in which there was a Truſt for Creditors, is ſufficient Notice of the Truſt. 319, 320

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Oath. Vide **Affidavit.**

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AN Eſtate by *Occupancy* not ſubject to Debts, before the Statute of *Frauds.* 234

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A Plea of Outlawry, no Bar to a Suit brought by one as Executor. 185

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Vide **Agreement Parol.**

Parol Declaration is ſufficient to charge Lands with Payment of Debts, where a Man has but an Equity only. 45

Parſon, Vicar and Impropriator.

As touching Bonds to reſign. Vide **Simony.**

A Parſon impropriate hath not *de jure* the Nomination of the Vicar. 42

Impropriator of the ſmall Tithes is bound to maintain a Prieſt, where there is no Vicarage endowed. 247

And in ſuch Caſe the King may aſſign to the Curate ſuch a Proportion of the ſmall Tithes, as he thinks fit. *ibid.*

But otherwiſe it is, where there is an Endowment, tho' never ſo ſmall. *ibid.*

Parties.

An Executor, though he has actually releaſed, yet he muſt be made a Party to the Suit. 31

Bill to be relieved againſt a Bail-Bond aſſigned by the Sheriff by Fraud; the Plaintiff in the Action at Law muſt be a Party. 87

No good Cauſe of Demurrer, that an Executor is not a Party, when the Plaintiff alledges, he knows not who is Executor, and prays the Defendant may diſcover him. 95

A Truſtee for three Perſons is called to an Account; all the *Ceſtuy que Truſts* muſt be Parties. 110

If there are three joint Factors, and a Man has a Demand againſt them jointly, a Bill againſt any one of them for the whole Duty is good. But *Quære*, if it be not only, where the other Factors are beyond Sea. 140

In a Bill againſt Executors who are only Executors in Truſt, it is not neceſſary to make the *Ceſtuy que Truſts*, or reſiduary Legatees, Parties. 261

A neceſſary Defendant being beyond Sea, upon an Affidavit made thereof, and that the Plaintiff knew not whether he was living or dead, the Plaintiff had an Order on Motion to proceed againſt the other Defendants without Prejudice, and afterwards had a Decree, without bringing the ſaid Defendant to Hearing. 487

Partners and Partnerſhip.

A ſurviving Partner trading on his own Account with the Debtors to the Partnerſhip; ordered that an Attorney be appointed to ſue for the Debts, unleſs the ſurviving Partner, will give Security to anſwer the ſame to the Executor of the deceaſed Partner. 118

Although it is uſual for Traders in Articles of Copartnerſhip, to provide againſt Survivorſhip, yet it is not neceſſary. 217

There are three Part-owners of a Ship, and one refuſing to navigate the Ship, the other two do it againſt his Conſent, and the Ship is loſt in the Voyage: He ſhall bear a Proportion of the Loſs; for he would have been intitled to a Share of the Profits, if there had been any. 297

If one of the Part-owners of a Ship refuſes to join with the Reſt in navigating the Ship, they may apply to the Court of Admiralty, and *that* Court will order that they ſhall have Liberty to navigate the Ship alone; and in ſuch Caſe they will not be accountable to him that refuſed, for any Part of the Profits: Nor will he be liable to anſwer for any Loſs. 297, 8

Where the major Part of the Part-owners of a Ship ſettle, and agree an Account of the Profits of a Voyage, it ſhall conclude the Reſt. 465

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Bill in Equity lies for a Partition of Land; but *that* is grounded on the Statute, which makes one Tenant in Common accountable to other; and they are now as it were Truſtees one for the other. 421

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Motion by the King's Patentee for an Injunction to ſtop the Sale of *Engliſh* Bibles printed beyond Sea denied, but Trial at Law ordered. 120

Injunction denied to ſtay an Interloper's Trading to the *Eaſt Indies*, till the Validity of the *Eaſt India* Company's Patent was tried. 127

Whether the Patent to the *Eaſt India* Company be a Monopoly, or only a Regulation of Trade. 130

A Bill in Equity lies to reverſe Letters Patents obtained by Fraud. 277

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Upon a Bill brought by a Clothier againſt a Pawn-broker, to whom the Plaintiff's Factor had pawned the Plaintiff's Cloaths; for a Diſcovery whether thoſe Goods came to the Defendant's Hands; the Defendant by Anſwer admitted the Factor had pawned ſome Goods to him, but did not admit they were the Plaintiff's, ſo that the Plaintiff not being able to bring an Action at Law for the Goods, moved that he might in the Preſence of two or more, have a View of the Goods; which was ordered accordingly. 407

Payment.

General Payment how it ſhall be applied.

Where a Man owes Money on Mortgage, and Money on Account to *J. S.* and makes a general Payment, it ſhall be applied in Satisfaction of the Mortgage, becauſe *that* Debt carries Intereſt. 24

A Debt is owing upon Bond with Sureties, and another Debt by ſimple Contract; afterwards an Account is ſtated of what is due for both Debts, and one Balance drawn, and a Bill of Sale is made for ſecuring the Balance, which proves deficient; the Money received on the Bill of Sale ſhall be applied towards Satisfaction of both Debts in Proportion. 34

A Creditor by Judgment, and alſo by Bond receives 200*l.* in Part, from the Purchaſer of the Eſtate of the Debtor; but it is not mentioned how it ſhall be applied. It being Part of the Purchaſe-Money, ſhall be applied towards Satisfaction of the Judgment. 468, 469

To whom to be made, and when good.

Money paid by the Borrower to the Scrivener, who was imployed in lending of it, is no good Payment, the Scrivener not having the Cuſtody of the Securities, but had all along received the Intereſt. 150

Penalty. Vide Bond.

Perpetuity.

Vide *Limitations of Terms for Years under Title* Estates.

A Deviſe to one and the Heirs of his Body, and if he ſhall go about to alien, his Eſtate ſhall ceaſe, and the Lands go over to a Charity. The Deviſe over is void, as tending to a Perpetuity. 161

A Perpetuity is a Thing odious in Law, deſtructive to the Commonwealth, will put a Stop to Commerce, and prevent the Circulation of the Riches of the Kingdom, and therefore is not to be countenanced in Equity. 164

A. by Will gives the Surplus of his perſonal Eſtate to his Daughter, whom he made Executrix, and willed, if ſhe died without Iſſue, it ſhould go over to *B.* and that ſhe ſhould give Security that if ſhe died without Iſſue, it ſhould go over accordingly. The Deviſe over is void; but *Quære*, whether the Directing the Bond to be given, does not alter the Caſe. 478

Perſonal Eſtate.

Where the perſonal Eſtate ſhall be applied to exonerate the Real. Vide *Title* Real.

Plea.

In pleading a Settlement made after Marriage in Purſuance of an Agreement before the Marriage: The Defendant ought to ſhew what the Agreement was. 139

In pleading a Purchaſe, the Defendant ought to deny Notice. 179

Plea over-ruled, becauſe the Fraud alledged in the Bill was denied in the Plea, and not by Way of Anſwer. 185

Plea of a Purchaſe for a valuable Conſideration, muſt alledge *Seiſin* and Poſſeſſion in the Vendor. 246

After a Proclamation returned, the Defendant cannot plead. 275

Nor can a Plea be taken upon a general Commiſſion to take the Anſwer only. *ibid.*

It is not neceſſary in a Plea of a former Suit depending for the ſame Matter to aver, that ſuch Suit is depending. 332

Such Plea is put in without Oath. *ibid.*

Bill intitling the Plaintiff as Adminiſtrator, the Defendant pleads the Plaintiff is not Adminiſtrator; good Plea. 473

Portions or Proviſions for Children.

Vide Legacies, or Portions veſted or lapſed under Title Legacy.

A Man being a Widower, and having ſeveral Children, by Settlement makes a Proviſion for his younger Children, Sons and Daughters, and then marries again and has other Children. The Children of the ſecond Marriage ſhall be included within the Words (*younger Children*) and ſhall have an equal Share with the Reſt in this Proviſion. 334

A Sum of Money ſecured by Mortgage, is given by Will to younger Children who are Infants, and for the more ſure Payment of it, the Eſtate of the eldeſt Son is charged with this Money. The Mortgagor during the Minority of the Infants, brings his Bill to redeem, and pays his Money to a Maſter puſuant to a Decree, and the Money is put out by the Maſter upon a Security, which proves bad; the Eſtate of the eldeſt Son ſhall not make it good. 336

If Lands of an Heir are charged with Portions payable to Infants at 21, or Marriage, the Heir ſhall not be admitted in Eaſe of his Land to pay in the Portions, before they are due, 338

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Diſcretionary Power. Vide **Diſcretion.**

A Power of appointing a Fee may be executed at ſeveral Times, *viz.* at one Time to paſs an Eſtate for Life, and the Fee at another. 85

Tenant in Tail, with Power to make a Jointure, articles before Marriage to ſettle a Jointure, but dies before any Settlement made; then the Wife dies; her Executors ſhall not have an Account of the Profits of the Lands agreed to be ſettled againſt the Remainder Man, who had ſettled thoſe Lands upon his Wife and her Iſſue. 406

There is a great Difference between the Non-execution, and a defective Execution of a Power. 407

Prerogative.

If there is a Deviſe of 1000 *l.* to ſuch Charity as the Teſtator had by Writing appointed, and no Writing can be found, the King may appoint the Charity. 224

A Deviſe for the good of poor People, the Deviſe being indefinite, the King may appoint the Charity. 225

Printing.

Motion by the King's Patentee for an Injunction to ſtop the Sale of *Engliſh* Bibles printed beyond Sea, denied; but a Trial at Law ordered. 120, 275

The Right of Printing controverted between the Univerſity of *Oxford*, and the King's Patentees. 275

Priority of Suit.

An Executor is ſued in the Spiritual Court, for a Legacy given to an Infant, allowed to bring a Bill for his Indempnity, and to have the Money ſecured for the Infant's Benefit. 26

After a Bill brought in the Exchequer to foreclose, the Defendant may bring a Bill in Chancery to redeem; and the Defendant in Chancery cannot plead the Pendency of the former Suit. 220

Privilege.

Two Defendants being Officers of the Exchequer, plead the Privilege of

that Court. Plea over-ruled, becauſe there was a third Defendant, who had not Privilege. 246

If a Member of Parliament ſues at Law, and a Bill is brought to be relieved againſt that Action; the Court will grant an Injunction, till Anſwer and further Order. 329

Proceſs.

Vide **Demiſe of the King.**

An Action being brought at Law againſt a Man for arreſting one upon a Commiſſion of Rebellion, that iſſued irregularly; the Court granted an Injunction, becauſe the Irregularity ought to be puniſhed in this Court. 269

Contempt. Vide *Title* **Contempt.**

By an Order for Time to anſwer, all Contempts are not ſtayed, unleſs it is ſo ordered. 104

When Proceſs of Contempt ſhall determine by Demiſe of the King, and when not. 237

Subpœna.

When a Cauſe has ſlept twelve Months, there can be no Proceedings, without firſt ſerving a *Subpœna ad faciend' attornatum.* 172

Attachment.

Where a Man is arreſted upon an Attachment, the Contempt ſhall hold good, though no Affidavit be filed at the Time of taking out Attachment, if filed before the Return of it. 172

Sequeſtration, and Sequeſtrators.

The Sequeſtrators having by an Order a Power to fell Timber on the Defendant's Eſtate, they fell Timber to the Value of 7000 *l.* and pay over but 2000 *l.* to the Plaintiff; the Sequeſtrators being Officers and Agents of the Court. The Plaintiff not chargeable with more than 2000 *l.* though the Defendant was an Infant. 160

Sequeſtration in Proceſs.

A Sequeſtration, which Iſſues as meſne Proceſs, determines by the Death of the Party. 58

One of the Defendants is in Contempt to a Sequeſtration for want of an Anſwer, and the Cauſe is heard againſt the other Defendants, yet he may come in and Anſwer, and the Cauſe may be heard again as to him. 228

A Bill is to be taken *pro confeſſo*, after a Sequeſtration returned. 247

Sequeſtrators on meſne Proceſs accountable for the Profits, and can retain only ſo far as to ſatisfy for the Contempts. 248

Sequeſtrations, though now a common Proceſs; yet they were firſt introduced in Lord *Bacon*'s Time, and then but ſparingly uſed in Proceſs, and after a Decree, to ſequeſter the Thing in Demand only. 421

Seque-

Sequeſtration for Non-performance of a Decree.

A Sequeſtration which iſſues as meſne Proceſs, determines by the Death of the Party: otherwiſe if it iſſues after a Decree, though for a perſonal Duty. 58

A Sequeſtration ſhall bind from the Time the Sequeſtration was awarded, and not only from the Time of executing it. *ibid.*

Sequeſtration after a Decree for a perſonal Duty, ſhall not prevent the Wife's Dower. 118, 166

Whether a Sequeſtration after a Decree for a perſonal Duty, ſhall be revived againſt the Heir. 166

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Prohibition to an inferior Court for holding Plea of a Matter out of their Juriſdiction. 276

It lies not to an inferior Court after the Defendant has pleaded there, for by pleading he ſubmits to the Juriſdiction. 301

But Prohibition lies at the Suit of the King, though the Defendant has pleaded. *ibid.*

If a Prohibition has gone, the Court will not grant a *Superſedeas* without an Affidavit, that the Cauſe aroſe within the Juriſdiction. *ibid.*

Proportion.

Vide **Average.**

A Debt is owing by Bond with Sureties, and another Debt on ſimple Contract; afterwards an Account is ſtated of what is due for both Debts, and one Balance drawn; and a Bill of Sale is made for ſecuring the Balance: The Money received on the Bill of Sale ſhall be applied towards Diſcharge of both Debts in Proportion. 34

Black Acre is deviſed to *J. S.* with a Proviſo, that if he be evicted, he ſhall have White Acre. *J. S.* is evicted of a Moiety of Black Acre, he ſhall only have a Satisfaction *pro tanto* out of White Acre. 270

There are three Part-owners of a Ship, and one refuſing to navigate the Ship, the other two do it againſt his Conſent, and the Ship is loſt in the Voyage: He ſhall bear his Proportion of the Loſs; for he would have been intitled to a Share of the Profits, if there had been any. 297

A. on his Marriage agrees to ſettle particular Lands on his Wife and their Iſſue, and afterwards ſells Part of the Lands; Jointreſs decreed to have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unſold; but that Decree reverſed, for it would be an Hardſhip on the Iſſue, to make them bear the whole Loſs, who ought only to bear a Proportion. 440

When the Jointreſs and the Iſſue claim by the ſame Settlement, they ſhall contribute proportionably in the Diſcharge of any prior Incumbrance on the Eſtate. *ibid.*

Publication.

If one of the Parties after Publication paſſed, has an Order to examine Witneſſes upon the uſual Affidavit

Affidavit, the other Party may not only croſs examine, but examine at large. 253

Purchaſe and Purchaſe-Money.

A. buys Lands, and before Payment of his Purchaſe-Money becomes a Bankrupt; the Vendor ſhall not come in as a Creditor for the Purchaſe-Money; but the Land ſhall ſtand charged with the Payment thereof. 267

Where Lands are to be ſold for the Payment of particular Debts, a Purchaſer muſt take Care to ſee his Purchaſe-Money rightly applied. 301

But if more is ſold than is ſufficient to pay the Debts, that ſhall not turn to the Prejudice of the Purchaſer. *ibid.*

Plea of a Purchaſe. Vide Plea.

Purchaſer.

How far favoured.

As touching the Buying in of Incumbrances, Vide *Title* Securities.

A Purchaſer being in a Man's Study, ſnatches up a Statute which would have affected the Eſtate, and puts it in his Pocket. Equity will not take from him the Advantage he has got at Law, though he came ſo unfairly by it. 52

The Iſſue in Tail encouraging a Man to buy of the younger Son an Annuity given him by the Will of his Father. Decreed to confirm the Annuity. 136

A Settlement made after Marriage, in Purſuance of Articles before Marriage, is good againſt a Purchaſer; but if the Settlement goes beyond the Articles, as to ſo much it is voluntary, and ſhall be void againſt a Purchaſer. 286

A Purchaſe of an Eſtate of Tenant for Life, who was outlawed and abſconded, ſet aſide in Favour of Creditors, the Purchaſe being made at an Under-value, and pending the Proſecution at Law againſt him, and with Notice thereof. 465

A Purchaſe with Notice of a voluntary Leaſe, made by the Vendor to his own Daughter, takes Security from the Father (the Seller) that his Daughter when of Age ſhall ſurrender the Leaſe. The Daughter ſhall enjoy the Leaſe againſt the Purchaſer. 467

Recognizance. Vide Judgment, &c. under Title Securities.

Recovery Common.

A Common Recovery by *Ceſtuy que Truſt* in Tail, bars the Entail, and all the Remainders. 10, 440

Releaſe.

Releaſe ſet aſide by Reaſon of the Miſapprehenſion of the Party that gave it. 32

Remainder.

Contingent Remainder.

If a contingent Remainder is deſtroyed by a legal Conveyance, and that Conveyance is obtained by Fraud, Equity will relieve againſt it. 443

Replication.

Defendant by Anſwer having ſaid, he believes and hopes to prove the Plaintiff's Demand ſatisfied, and the Cauſe being heard upon Bill and Anſwer; the Plaintiff could have no Decree; but upon Payment of Coſts, had Leave to Reply. 140

Whether after a Plea or Demurrer to a ſpecial Replication is allowed, the Plaintiff may be admitted to put in a general Replication. 351

Return of Writs.

Scire facias to repeal a new Charter after a Surrender of the old one; whether to be returned by the old Sheriff, or by the Sheriffs according to the new Charter. 155

Revivor. Vide Abatement. Vide Scire facias.

Revocation.

Revocation of a Will. Vide *under Title* Will.

A Mortgage made ſubſequent to a Deed with Power of Revocation ſhall be a Revocation *pro tanto* only. 84, 141, 182

Scandal.

AS to a Demurrer for Scandal in a Bill. 107

Scire Facias.

An Aſſignee may revive a Decree by *Scire facias*, if the Decree is ſigned and enrolled; otherwiſe not. 283

Securities and Incumbrances.

Judgment, *Statute*, *Recognizance*.

Where a Statute is once extended, it cannot be tried upon an Ejectment, whether ſatisfied or not; but the only Remedy is by a *Scire fac. ad computandum*, or Bill in Equity. 50

Conuſee of a Statute having extended the Land, aſſigns to *J. S.* and dies. One that had a ſecond Statute gets Adminiſtration, and acknowledges Satisfaction on the firſt Statute. Equity will relieve againſt this Practiſe, and put the Aſſignee in the ſame Plight, as before Satisfaction was acknowledged. 51, 2

Judgment preferred to a Statute, but an Extent on a Statute ſhall not be avoided by a ſubſequent Judgment. 294

A Term for Years in the Hands of an Executor, is not extendable in Satisfaction of a Statute. *ibid.*

A prior Statute extended ſhall not be avoided by a ſubſequent Judgment. 294

An Action at Law will lie upon a Recogniſance; but if it is entered into in Purſuance of an Order of the Court of Chancery, the Court will not allow it to be ſued otherwiſe than by a *Sci. fac.* in that Court. 313

Conuſee of a Judgment extends the Lands of the Conuſor upon an *Elegit*, and then the Conuſor grants the Reverſion to a Stranger. The Grantee may bring a Bill to redeem the Conuſee, though at a great Diſtance of Time, and tho' a former Bill for the ſame Purpoſe was diſmiſſed. 398

A. having recovered Judgment againſt *B.* brings a Bill, and charges that *B.* had conveyed his Eſtate to Truſtees, and had lent 1000*l.* in the Name of a third Perſon, and prays that this might be liable to the Plaintiff's Debt. The Defendant demurred, becauſe in his Life-time he was not bound to diſcover his perſonal Eſtate. Demurrer over-ruled. 399

A. having Judgment againſt *B.* may bring a Bill for a Diſcovery and Account of the Goods of *B.* concealed in the Hands of a third Perſon, after Execution taken out, but not before. *ibid.*

Securities and Incumbrances taken in by an Heir or Purchaſer, or a ſubſequent Incumbrancer.

Aſſignee of a Statute purchaſes the Eſtate, having Notice of a ſecond Statute: How far he ſhall make Uſe of the firſt Statute to protect his Purchaſe. 49

A Purchaſer buys in a Statute, that is extended; he ſhall account only according to the extended Value, and not according to the real Value. 52

A third Mortgagee, without Notice at the Time of his Mortgage, buys in the firſt Incumbrance, being a ſatisfied Judgment: He ſhall have the Benefit of this Judgment, though when he took it in, he had Notice of the ſecond Mortgage. 187

An Heir buys in an Incumbrance on an Eſtate charged with Portions to his younger Brothers and Siſters; he ſhall be allowed no more than what he really paid. 335

Bought in for leſs than is due.

Where a Mortgagee buys in an Incumbrance, he ſhall be allowed all that is due on it, though he bought it in for leſs. 49

But where an Heir or Truſtee buys in an Incumbrance, he ſhall be allowed no more than paid, unleſs he bought it in to protect an Incumbrance, to which he himſelf is intitled. *Ibid.*

But as againſt a Purchaſer, no Perſon buying in an Incumbrance, ſhall be allowed more than what he really paid. 464

A Mortgagee aſſigns his Mortgage for leſs than is really due to him. The Mortgagor, ſhall not redeem without paying the whole Money due on the Mortgage. 476

But where there are ſubſequent Incumbrances, or Creditors in the Caſe: The Perſon that buys in prior Incumbrances, ſhall be allowed only what he really paid, but otherwiſe it is betwixt the

Buyer of the Incumbrance and the Mortgagor. 476

Sequestration. Vide **Process.**

Ship, Part-owners of a Ship. Vide **Partners.**

Solicitor. Vide **Attorney.**

Simony.

Whether Bonds of Resignation are simoniacal. 131

In Case of a Bond for Resignation, if the Patron makes an ill use of it, as to prevent the Incumbent from demanding Tithes in Kind, a perpetual Injunction shall be granted. 411, 412

Spiritual Court.

An Executor, though sued in the Spiritual Court, for a Legacy given to an Infant, may bring a Bill in Equity for his own Indemnity, and to have the Money secured for the Infant's Benefit. 26

If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition shall go. 93

Statutes.

Misspleading of a publick Act of Parliament. 113, 114

Statute of Limitations. Vide **Limitation.**

Statute of Frauds and Perjuries. Vide *under Title* **Agreement.**

Statutes for Security. Vide **under** Title **Securities.**

Subpœna. Vide **under** Title **Process.**

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Sureties for the due Administration of a personal Estate get up their Bond, and procure insufficient Security to be accepted in their stead by the Prerogative Court. They being once discharged at Law, Equity will not charge them. 196

Survivor.

Vide **Jointenants.**

Two Persons occupy and stock a Farm jointly, there shall be no Survivorship: But if two take a Lease jointly of a Farm, the Lease shall survive. 217

Stock imployed in a Way of Trade shall in no Case survive. *Ibid.*

Although it is common for Traders in Articles of Copartnership to provide against Survivorship, yet it is not necessary. *ibid.*

Where two become jointly interested in any Thing by Way of Gift, the same shall be subject to all the Consequences of Law, and Survivorship shall take Place; but

but otherwiſe it is of a joint Undertaking in a Way of Trade. *ibid.*

A. deviſes the Surplus of his Eſtate to his two Nephews equally to be divided betwixt them, and appoints his Executor to lay it out for the Benefit of his ſaid Nephews; one of the Nephews died in the Teſtator's Life-time: The ſurviving Nephew ſhall have the Whole, the later Words, by which the Surplus is appointed to be laid out for the Benefit of the Nephews, being joint. 425

Surplus of a perſonal Eſtate bequeathed to *A.* and *B.* it is a joint Deviſe and ſhall ſurvive. It had been the ſame if *A.* and *B.* had been Executors, and *A.* had poſſeſſed himſelf of a Moiety of the Goods, and had died. 482, 483

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A Decree to bind the Inheritance, ought not to be made upon one Trial at Law. 293

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How conveyed, barred, or transferred.

A Truſtee ſells the Eſtate as his own to one who had no Notice of the Truſt; a Fine, and five Years Non-claim paſs: The Truſtee afterwards repurchaſes the Eſtate. He ſhall ſtand intruſted as before. 60

Fine levied by a Truſtee, and five Years Non-claim paſſes, does not deſtroy the Truſt, nor ſeparate it from the Land, but transfers them both together. 84

Fine and Non-claim no Bar, where there is Notice of the Truſt. 149

Fine and Non-claim by *Ceſtuy que Truſt* in Tail, ſhall bar the Remainder-Man. 226

Common Recovery ſuffered, or Fine levied by *Ceſtuy que Truſt* in Tail, has the ſame Effect in Equity, as it would have at Law, in Caſe the legal Eſtate was in him. 440

Held by ſome, that even a Bargain and Sale enrolled by *Ceſtuy que Truſt* in Tail ſhall bind the Iſſue, in Regard ſuch a Truſt is not within the Statute *de Donis.* *ibid.*

An Executor in Truſt for an Infant, Reſiduary Legatee renews a Leaſe,

Part of the Teſtator's perſonal Eſtate in his own Name, and then aſſigns it to a Truſtee to pay his own Debts: The Truſtee ſells to one who had Notice of the Infant's Title. Purchaſe ſet aſide. 484

Reſulting Truſt, and Truſt by Implication and Conſtruction.

Leaſe for Years in Writing is made to *A.* only, but by Parol agreed to be in Truſt for *A.* and *B.* from Time to Time pays a Moiety of the Rent, but no Truſt is declared in Writing. Whether this is a reſulting Truſt to *B.* 108

A. buys Land and pays the Purchaſe-Money, but the Conveyance is made to *B.* this is a reſulting Truſt for *A.* 109

There are three Leſſees of a Church-Leaſe, one of them ſurrenders the old Leaſe, and takes a new one to himſelf. This ſhall be in Truſt for all three. 276

A Man having made his Will, and his Wife Executrix, the Son prevails on his Mother to get the Father to make a new Will, and that he might be named Executor, and promiſes to be a Truſtee therein for his Mother. Truſt decreed, notwithſtanding the Statute of Frauds. 296

If *A.* purchaſes in the Name of *B.* and pays the Purchaſe-Money, *that* will make it a Truſt ariſing by Implication of Law; but if *B.* claims the Eſtate, the Proofs muſt be very clear, that *A.* paid the Money. 366

vid 432. Hamond v. Hicks

For raiſing Portions, and Payment of Debts.

Vide *Deviſe of Lands to be ſold for Payment of Debts*, &c.

A Deed of Truſt made for Payment of Debts, ſhall not extend to a Debt contracted afterwards. 28

There are two ſeveral Truſt-Eſtates for Payment of Debts; the Heir ſhall not have an Account of one without the other. 29

If an Eſtate is deviſed to a Stranger, for Payment of Debts, all Debts ſhall be paid equally; otherwiſe, if the Deviſe is to the Executor; for in that Caſe the Land is legal Aſſets. 63

A Deviſee in Truſt to pay Mortgages, and then Legacies, is made Executor; he mortgages to pay other Debts of the Teſtator. Such new Mortgage ſhall take Place of the Legacies. 69

One ſeiſed in Tail, and a Term for Years in Truſtees to attend the Inheritance, levies a Fine, and by Deed ſubjects the Land to a Debt of 1000*l.* but declares that after the Debt paid, the ſame ſhall be to the old Uſes, and after deviſes the Land for the Payment of all his Debts. Whether the Land is liable to all the Debts in general. 99, 100

A Man indebted by ſeveral Mortgages, Judgments, and Bonds, and in other Debts by ſimple Contract, ſettles his Eſtate for Payment of his Debts. The real Securities ſhall be firſt paid, and then the Bonds, and ſimple Contract Debts in an Average. 101

Land deviſed to pay Debts and Legacies out of Rents and Profits may be ſold; otherwiſe if out of annual Rents: But if ſuch Truſt be by Deed, the Land cannot be ſold in either Caſe. 104

A. obtains a Decree againſt *B.* for 2700 *l.* who appeals to the Houſe of Lords, where the Decree is affirmed, and *B.* on Petition obtains an Order for Rehearing, and immediately falling ill makes his Will, and deviſes his Land for Payment of his Debts. Decreed that after all the other Debts were paid, *A.* ſhould be paid his Debt. 142

A Term for Years is limited by a Settlement in Truſt for raiſing Portions for younger Children payable at 21, or Marriage; one dies an Infant unmarried. The Portion ſhall ceaſe, and not be raiſed for the Benefit of the Adminiſtrator: Otherwiſe if it was to be raiſed out of a perſonal Eſtate. 204

Where a Legacy is given to be raiſed out of Profits of Lands, if the Profits will not raiſe it in a convenient Time, the Court will Decree a Sale. 256

Deed of Truſt for Payment of ſuch Creditors as come in within a Year. A Creditor will not be excluded, tho' he doth not come in till after the Year. 260

Where Lands are to be ſold for Payment of particular Debts, a Purchaſer muſt take Care to ſee his Purchaſe-Money rightly applied. 301

But if more is ſold than is ſufficient to pay the Debts, that ſhall not turn to the Prejudice of the Purchaſer. *Ibid.*

One deviſes his Lands for Payment of his juſt Debts; the Teſtator while a Student at *Cambridge* had been by Surprize prevailed on to give a Covenant to pay his Siſters Portion, and afterwards conteſted it; yet decreed this to be a Debt to be paid within the general Proviſion. 431

Debts ariſing by a Misfeazance; as for an Eſcape, or Breach of Truſt, or contracted *mala fide*, are not within a general Proviſion for Payment of Debts. 432

Where Lands are deviſed for Payment of Debts and Legacies: Whether the Debts ſhall have Preference of the Legacies or not 482

Truſtee to preſerve contingent Remainders.

Whether a Truſtee to preſerve contingent Remainders ſhall be decreed to join with the Husband and Wife in a Sale to pay Debts, when there is no Probability of Iſſue. 181

How and when to be charged and diſcharged, and what Allowances to have.

A Truſtee, that buys in an Incumbrance, ſhall be allowed no more than he paid. 49

A Truſtee ſhall account as a Bailiff only, and ſhall not be charged with imaginary Values; although he had covenanted to let the Land, and yet had kept it in his own Hands. 144

Very ſupine Negligence may in ſome Caſes charge a Truſtee with more than he receives; but then the Proof muſt be very ſtrong. *ibid.*

Each Truſtee ſhall be charged for no more than he actually receives: But

But otherwiſe it is, if the Truſtees join in Receipts. 303

If a Truſtee manages the Eſtate himſelf, he is not to be allowed for his Trouble: Otherwiſe if he employs a Bailiff. 316

A Truſtee in a Recognizance releaſes it without any Conſideration, decreed to pay the Principal and Intereſt, not exceeding the Penalty. 342

Tithes.

In a Bill for Tithes by an Executor of a Parſon, he need not offer to wave the Forfeiture, and accept the ſingle Value, he not being intitled by the Statute of *Edw. 6.* to the treble Value. 60

Bill brought to examine Witneſſes *in perpetuam rei memoriam* to prove a *Modus Decimandi*. Defendant demurred. Demurrer over-ruled. 185

But *Quære* if ſuch a Bill may be brought to eſtabliſh a *Modus. ibid.*

Venue. Vide **Trial.**

Verdict.

Relief denied after a Verdict.

The Plaintiff in Equity not intitled to a Diſcovery after a Verdict againſt him at Law. 176

An Infant ſhall have an Account of Profits againſt an Intruder, as againſt a Guardian; but where there is a Verdict againſt the Infant's Title, there ſhall be no Account of Profits till he has recovered at Law. 295

Relief denied after a Verdict, tho' the Damages given by the Jury were thought to be exceſſive. 316

Vicar. Vide **Parſon.**

Univerſity.

The Chancellor's Court in *Oxford*, hath no Juriſdiction touching Matters of Freehold. 212

Voluntary.

Vide **Deeds.**

Voluntary Settlement made by the Father, is fraudulent as to any Mortgage made by himſelf. Otherwiſe as to a Mortgage made by the Son. 46

Voluntary Settlement without Power of Revocation, ſhall bind the Party, and ſhall not be defeated by a ſubſequent Will. 100

A. voluntarily charges Land in *D.* with a Portion for a Daughter by a firſt Venter, and then ſettles Part of theſe Lands for the Jointure of a ſecond Wife, who has no Notice of the Charge. *A.* believing the Portion would take Place of the Jointure, by Will gives Lands in *S.* to his Wife in lieu of her Jointure. The Wife in Combination with the Heir, refuſes to accept the Deviſe. Decreed the Daughter ſhould hold the Lands in *S.* till her Portion was paid. 219

A voluntary Surrender made by a Man in his Sickneſs, good againſt his Wife and Children, who claimed under a ſubſequent Surrender made upon his Marriage, after his

his Recovery of that Sickneſs. 365
Voluntary Bond after Marriage to make a Jointure to a Wife, the Husband accordingly makes a Jointure, the Wife during the Coverture gives up the Bond, the Jointure is evicted: The Delivery up of the Bond by the Wife during the Coverture will not bind her; and there being no other Creditors, the Jointure ſhall be made good out of the perſonal Eſtate. 427
Equity will not relieve againſt the Breach of a Condition in a voluntary Settlement. 456
After a voluntary Settlement, a Man cannot deviſe the ſame Eſtate though for Payment of his Debts. 464
A Settlement, though voluntary, is not revocable, nor the Eſtate ſo ſettled, chargeable by Will. *ibid.*

Uſes.

A Conveyance by Way of Feoffment may operate as a Covenant to ſtand ſeiſed. 40
A Feoffment without Livery to Truſtees to ſtand ſeiſed to the Uſe of a Brother in Conſideration of Blood, will amount to a Covenant to ſtand ſeiſed. 141
Lands limited to *A.* in Truſt for a Feme Covert, and that *A.* ſhould receive the Rents, and apply them as the Feme, whether Sole or Covert ſhould direct. This is a Truſt, and not an Uſe executed by the Statute. 415

Uſury.

One intitled to a Reverſion after two old Lives, takes 350 *l.* and agrees to pay for it 700 *l.* when the Lives fall, and mortgages this Reverſion as a Security; both the Lives drop in two Years. No Relief againſt this Bargain. 141
A young Lady intitled to 10000 *l.* Portion payable after the Death of an old Man, becomes marriageable, and ſells the Portion for 6000 *l.* preſent Money. Whether this is binding. 142
A. agrees with *B.* to pay double Intereſt to *B.* during *B*'s Life, and that *A.* ſhall have the Principal after *A*'s Death. Whether a good Agreement. *ibid.*

Waſte.

A. Tenant for Life, Remainder to *B.* for Life, Remainder over. *A.* though diſpuniſhable of Waſte at Law, by Reaſon of the meſne Remainder for Life, ſhall be injoined from committing Waſte in a Court of Equity. 23
But Tenant for Life without Impeachment of Waſte, ſhall not be injoined from committing Waſte. *ibid.*
Exceſſive Damages awarded by an Umpire in reſpect of Waſte done; and though the Party had made good the Repairs within 40 *s.* before the Award made, yet no Relief. 157
Remainder-Man for Life, ſhall in Waſte recover Damages in Proportion to the Wrong done to the Inheritance, and not in Proportion only to his own Eſtate for Life. 158

Will and Teſtament.

My Debts and Legacies being firſt deducted, I deviſe all my real and perſonal Eſtate to *J. S.* This amounts to a Deviſe to ſell for Payment of Debts. 45

A Will in *Dutch* or *Latin* muſt be ſo framed, as to paſs an Eſtate according to the Rule of our Law. 85

Whether after forty Years Poſſeſſion of a Copyhold Eſtate under a Will, a Surrender to the Uſe of the Will, ſhall not be preſumed. 195

An Infant at ſeventeen may make a Will. 255

Will.

Probate.

If an Executor dies before Probate, his Executor cannot prove the Will, but Adminiſtration *cum teſto annex'* muſt be granted to the Reſiduary Legatee (if any) or to the next of Kin. 200

As touching the Courſe uſed in the Spiritual Court, where Legacies in a Will are eraſed; and as touching a Conſent that the Will ſhould be proved with the Words eraſed inſerted. 256

A Will of a perſonal Eſtate, which lies in a foreign Country, may be proved there, and it is not neceſſary to prove it here. 397

Deviſe and Deviſee.

Deviſe for a Charity. Vide *Deviſe to a charitable Purpoſe, under* Title **Charity.**

A. deviſes ſpecifick Legacies, *&c.* and gives the Reſt of her Goods and Chattels unto her Executors, and afterwards gives them 100 *l.* a-piece for their Care and Trouble, and after Debts and Legacies, gives the *Reſiduum* to *J. S.* decreed to *J. S.* and Executors had only 100 *l.* a-piece. 30

Goods are deviſed to *A.* for Life, and after his Death to the Heir of *B. B.* dies in the Life of *A.* he that was Heir of *B.* at his Death, and not he, who was his Heir, at *A's* Death ſhall have the Goods. 35

Perſonal Eſtate deviſed to the Wife, upon Truſt not to diſpoſe thereof, but for the Benefit of her Children; ſhe by Will gives 5 *s.* only to one Child: Decreed the Eſtate to be divided equally. 66

Whether an eldeſt Son ſhall have the Benefit of his Father's Will as to one Part, when he goes about to defeat the Proviſion made in another Part, for the Benefit of his Brothers and Siſters. 96

Deviſe of Lands to be ſold for Payment of Debts, &c.

Vide *Truſts for raiſing Portions and Payment of Debts.*

My Debts and Legacies being firſt deducted, I deviſe all my Eſtate real and perſonal to *J. S.* This amounts to a Deviſe to ſell for Payment of Debts, 45

Land is deviſed to pay Debts and Legacies out of Rents and Profits; the Land may be ſold: Otherwiſe if out of annual Rents and Profits: But if ſuch Truſt be by Deed, the Land cannot be ſold in either Caſe. 104

A. obtains a Decree for 2700 *l.* againſt *B.* who appeals to the Houſe of Lords, where the Decree is affirmed; and *B.* on Petition obtains an Order for Rehearing, and immediately falling ill makes his Will, and deviſes his Land for the Payment of his Debts. Decreed

creed that after the other Debts paid, *A.* ſhould be paid his Debt. 142

Where a Legacy is given to be raiſed out of Profits of Lands, if the Profits will not raiſe it in a convenient Time, the Court will Decree a Sale, 256

One deviſes all his Lands to *A.* in Tail, Remainder over, and in another Part of his Will deviſes to *A.* all his perſonal Eſtate, and makes him Executor, *willing him to pay his Debts.* The Land, as well as the perſonal Eſtate is liable to the Payment of the Debts. 411

One deviſes his Lands for Payment of juſt Debts, Teſtator while a Student at *Cambridge* had been prevailed upon to give a Covenant for Payment of a Portion to his Siſter; but afterwards all along conteſted the Debt: yet decreed to be a Debt to be paid within this general Proviſion. 431

Debts ariſing by a Miſfeazance, as for an Eſcape or Breach of Truſt, or contracted *mala fide*, not within a general Proviſion for Payment of Debts. 431, 432

I will all my Debts ſhall be paid before any of my Legacies, or Gifts herein after mentioned, and then the Teſtator gives ſeveral pecuniary Legacies, and deviſes Lands to *A.* on Condition to pay 5 *l. per Ann.* to *B.* the Lands are not ſubject to the Payment of the Debts. The general Clauſe in the Beginning of the Will ſhall be conſtrued to refer only to the perſonal Eſtate, and the pecuniary Legacies given thereout. 457

Lands deviſed for Payment of Debts and Legacies. The Debts and Legacies ſhall be paid *pari paſſu.* Decreed by Lord *Nottingham*, but that Decree reverſed by Lord *North*, who gave Preference to the Debts; but afterwards Lord *Jefferies* diſſatisfied with that Reverſal. 482

What and by whom deviſeable, and good or void.

Deviſe of 10000 *l.* to procure a Dukedom to the Head of his Family, by all lawful Means, ſo as it be done within a Twelve-month. 5

Tenant in Tail of an Equity of Redemption, may deviſe it for Payment of Debts. 41

What Eſtate or Intereſt paſſes.

A Deviſe to a Stranger after the Death of the Wife, ſhall not paſs an Eſtate for Life to the Wife by Implication; but otherwiſe of ſuch a Deviſe to the Heir. 22

A Man deviſes Lands to *A.* for Life, and as to the ſaid Lands, gives the Reverſion to *B.* and *C.* They have only an Eſtate for their Lives. 65

What Things, and how much paſs by the Words, and to whom.

A. ſeiſed in Fee of diverſe Lands, and having alſo Lands mortgaged to him, deviſes all his Lands to *B.* and his Heirs. The Mortgage Lands do not paſs. 3

A. by Will directs 1000 *l.* to be laid out in her Funeral, and raiſed out of her Plate and Jewels, and then gives the Reſt of her Goods and Chattels

Chattels to her Executors; and in another Clauſe gives them 100 *l.* a-piece for their Trouble; and after Debts and Legacies paid, gives all the Reſt of her perſonal Eſtate to the Children of *B.* Decreed the whole Surplus to the Children. 30

Deviſe of the Surplus to *A.* and *B.* and *C.* and his Wife equally. *C.* and his Wife ſhall have only a third Part. 188

A Man ſeiſed in Fee, limits a Term upon ſuch Truſts, as he by Deed, or Will ſhould appoint, and for want of Appointment to attend the Inheritance. Afterwards by a Nuncupative Will, he gives *all*, *all* to *J. S.* and being a Baſtard dies without Iſſue. This will not paſs the Truſt of the Term. 340

Revocation.

What ſhall amount to a Revocation.

A. makes his Brother Executor, and gives him all his real and perſonal Eſtate; and afterwards marrying, by a Codicil makes his Wife Executrix: She ſhall have the perſonal Eſtate, and not the Brother. 23

A. having deviſed ſpecifick Legacies, *&c.* gives the Reſt of her Goods and Chattels unto her Executors, and afterwards in another Clauſe gives them 100 *l.* a-piece for their Care and Pains, and after Debts and Legacies paid, gives all the Reſt of her perſonal Eſtate to the Children of *J. S.* The *Reſiduum* decreed to the Children. 30

Lands deviſed firſt to one, and afterwards to another in the ſame Will: The laſt Clauſe ſhall not revoke the firſt, but they ſhall be joint Deviſees. 30

Mortgage made after a Settlement; with Power of Revocation, and a Will in Confirmation of it, is a Revocation *pro tanto* only, 97, 141, 182

One deviſes Lands in Fee, and then leaſes the ſame Lands for Years to a third Perſon, this is a Revocation only *pro tanto*. But if the Deviſor leaſes the Lands to the Deviſee himſelf, to commence after the Teſtator's Death; this is a total Revocation, as inconſiſtent with the Deviſe. 97

Mortgage ſubſequent to a Will is a Revocation in Law; but not a total Revocation in Equity. 329

Witneſs.

An Executor may be a Witneſs to prove the Revocation of a Legacy, though he has proved the Will. 20

A Witneſs cannot demur, becauſe the Queſtions asked him are not pertinent to the Matter in Iſſue. 165

A Co-Plaintiff, tho' but a Truſtee, cannot be examined as a Witneſs for the other Plaintiff. 230

Whether a Member of a Corporation may be a Witneſs for the Corporation. 254

An Umpire, though excepted to, was read as a Witneſs. 159

A Commiſſioner may be a Witneſs, but he muſt be firſt examined. 369

An Order to examine a Defendant *de bene eſſe*, ſaving juſt Exceptions is an Order of Courſe; and what is a proper Exception, and when to be made. *Vide* 452

Writs.

Writs of Error. Vide *Title* Error.

When a *Cepi Corpus* is returned, there is an End of all Proceſs, and though a Meſſenger of late Years has been uſually granted in ſuch Caſes, yet it is moſt regular to move, that the Defendant may enter his Appearance, and be examined within four Days, or ſtand committed. 344

Scire Facias.

A Purchaſer, or Aſſignee is not intitled to bring a *Scire facias* to revive a Decree; and to ſuch *Scire facias* to revive a Decree brought by a Purchaſer or Aſſignee, the Defendant may demur. 426

Superſedeas.

Superſedeas to a Writ *de Excommunicato capiendo* denied, tho' the *Significavit* was general and uncertain. 24

An Appeal is in it ſelf a *Superſedeas. ibid.*

Habeas Corpus.

Where a Perſon is excommunicated, if it be not for ſome of the Offences mentioned in the Statute 5 *Eliz.* and the Offence is not mentioned in the *Significavit*, the Remedy appointed by that Statute is a *Habeas Corpus*, and upon that the Party ſhall be diſcharged. 24

Mandatory.

Motion for a *Mandatory* Writ to the Chief Juſtice of the *King's Bench* to ſign a Bill of Exceptions denied, though ſuch Writ has iſſued to a Judge of an inferior Court. 175

De Cautione admittenda.

This Writ ought not to iſſue till Affidavit filed, that the Biſhop refuſed to admit of Caution. 119

York.

Vide London.

All the Children of a Man dying inteſtate within the Province of *York*, being advanced in his Life-time, his perſonal Eſtate ſhall be diſtributed according to the Statute. 200

A Man dying inteſtate within the Province, leaving a Wife and no Child; a Moiety of his perſonal Eſtate, decreed to be diſtributed according to the Statute. 134, 305, 314

F I N I S.